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Supreme Court, U.S.
FILED

JAN 5 2011

OFFICE OF THE CLERK

NO. 10-881

IN THE SUPREME COURT OF THE UNITED STATES

Henry Raab and Clara Montagna,
Petitioners,

v.

The Borough of Avalon, *et al.*
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the law as applied to this case conflicts with *U. S. v. Clarke,* which held that formal condemnation is the condemnor's way to acquire title and that inverse condemnation is for property owners to obtain just compensation not for the condemnor to obtain title?

2. Whether the two trial court, two appellate division decisions and three supreme court orders denied Petitioners due process by retroactively applying N.J. decisional law that did not interpret N.J.S.A.. 2A:14-1 to include inverse condemnation for a taking of property without due process or just compensation until 1996?

3. Whether the New Jersey Supreme Court denied of Petitioners' right to equal protection guaranteed by the 14th amendment by failing to grant equity to Petitioners based on *Klumpp v. Avalon* decided June 22, 2010, before denying Petitioners' appeal on June 30, 2010 and motion for reconsideration on October 7, 2010?

4. Whether the recent N. J. Appellate Division solution for a due process lack of notice problem in *Harrison Redevelopment Agency v. DeRose* should be utilized to protect Petitioners' right to due process?

5. Whether the facts of this case support two entirely different conclusions about whether Avalon took Petitioners' property?

LIST OF ALL PARTIES

1) Henry Raab and Clara Montagna, Petitioners (Plaintiffs below),

2) The Borough of Avalon, Respondent (Defendant and Third Party Plaintiff, below),

3) The State of New Jersey Department of Environmental Protection, (DEP) (Third Party Defendant below). (All third party claims by Avalon against the DEP were dismissed June 6, 2005 and not appealed.)

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1. The trial Court Order and Opinion dated June 6, 2005, denying Petitioners just compensation by reason of a statute of limitation (no citation) (A-51).

2. The first Appellate Division decision dated April 30, 2007 denying Petitioners' appeal is reported at 392 N.J. Super. 499, 921 A. 2d 470 (A.D. 2007) (A-29)

3. The first Order of the New Jersey Supreme Court Dated September 7, 2007, denying Petitioners' appeal and Petition for Certification is reported at 192 N.J. 475. (A.D. 2007) (A-27)

4. The trial Court motion Judgment and Opinion dated April 25, 2008 denying Petitioners' request to expunge the Cape May County Clerk's records of the first Order and Opinion of the trial Court and entering Declaratory Judgment, sua sponte and without notice to Petitioners, validating the automatic vesting of title to Petitioners property in Avalon, upon expiration of the six year statute of limitation for just compensation and the July 18, 2005 recordation in the County Clerk's office.(no citation). (A-18)

5. The Second Appellate Division decision dated July 29, 2009, denying Petitioners' appeal, was not published, but can be found at 2009 WL 2224033 (N.J. Super. A.D.). (A-3)

6. The second Order of the New Jersey Supreme Court dated June 30, 2010, denying Petitioners' second appeal and petition for certification 202 N.J. 231, 996 A.2d 1039, (2010).(A- 1)

7. The third Supreme Court of New Jersey Order dated October 7, 2010 denying Petitioners' Motion for Reconsideration, is not reported. (A- 62)

BASIS FOR JURISDICTION

Petitioners assert that the U.S. Supreme Court has jurisdiction pursuant to 28 USC § 1257, and the Court may grant a petition for a writ of certiorari to review the final three decisions of the New Jersey Supreme Court time barring just compensation pursuant to N.J.S.A. 2A:14-1, and approving automatic vesting of title in Avalon without notice to Petitioners, all of which denied Petitioners' right to due process and just compensation required by the 5th and 14th Amendments of the U.S. Constitution.

The first Appeal and Petition for Certification was denied on September 7, 2007 based on N.J.S.A. 2A:14-1, judicially amended to include inverse condemnation for just compensation. (A -27)

Second appeal and Petition for Certification was denied on June 30, 2010, confirming a process of automatic vesting of Petitioners' title to lots to Respondent, Avalon. (A-1)

A motion for reconsideration of second appeal and Petition for Certification was denied on October 7, 2010. (A-62)

CONSTITUTIONAL PROVISIONS

US Constitution 5th Amendment set forth below:

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* (Emphasis added.)

US Constitution 14th Amendment, Section 1 set forth below:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or*

> *enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (Emphasis added.)

New Jersey Constitution Art. 1, §1 set forth below:

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.

New Jersey Constitution Art. 1, §20 set forth below:

20. *Private property shall not be taken for public use without just compensation.* Individual and or private corporation shall not be authorized to take private property for public use without just compensation first made to the owners. (Emphasis added.)

STATUTES

> *N.J.S.A. 2A:14-1 Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property,* for replevin of goods or

> chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, *shall be commenced within 6 years next after the cause of any such action shall have accrued.*

N.J.S.A. 20:1-1. Inability to acquire land by agreement with owner (see appendix A-190)

N.J.S.A. 20:3-5 Eminent Domain jurisdiction (see appendix A-191).

N.J.S.A. 20:3-6 Application of Eminent Domain Act (see appendix A-191).

N.J.S.A. 46:16-1.1 permits the recordation of any judgment *affecting title* to real property without notice to property owner in County Clerk's office (see appendix A-198).

N.J.S.A. 46:22-1. Protects grantees of recorded deeds from subsequent unrecorded judgements, deeds and mortgages (see appendix A-199).

N.J.S.A. 54:4-31. Requires that an abstract of any deed for property to be mailed to assessor in that

municipality together with the name and address of the grantee (see appendix A-199).

STATEMENT OF THE CASE

FACTS

1. In 1961, Petitioners' predecessor in title, Tri-Guy Holding Company, Inc. (Tri-Guy) acquired the lots subject to this action from Avalon by exchanging, at Avalon's request, eroding vacant undeveloped lots previously purchased from Avalon (A-131) for the vacant undeveloped lots herein. (A-126)

2. After a March 1962 northeast storm devastated the New Jersey coastline causing significant erosion of the beaches and leaving them littered with debris from destruction of beach front homes, Avalon adopted Resolution #62-102 on August 15, 1962. (A-183) This resolution was filed in the Avalon clerk's office, but never published or served upon Tri-Guy. It did not identify either the affected properties or their owners. The Resolution authorized Avalon enter immediately upon property to be used as protective barriers to take control and possession thereof, and to do such acts as may be required, including removing, destroying or otherwise disposing of any property located thereon without first paying any compensation therefor.

The resolution also made clear that nothing in this resolution shall be construed to deny any person who has interest in any property which has been possessed by the Borough of Avalon the right to

obtain therefor just compensation to the extent that such property shall have been taken by the Borough. The resolution also made clear that no compensation shall be granted to any individual to the extent that the action of the Borough of Avalon did not amount to a taking of property, pursuant to a proper exercise of police power.

3. Avalon never sent Tri-Guy, any notice indicating whether they had taken its property or whether they had simply engaged in a police power action to cleanup the debris and replenish the beach.

4. Avalon adopted Resolution 62-103 (A-188) on August 15, 1962 indicating that because of the oncoming of hurricane season it was necessary *to construct protective barriers in the form of sand dunes between 13th and 80th streets* immediately and dispense with advertisements for bids because of the urgency such construction demands. The resolution did not identify the properties or the owners that were affected. This resolution was never published or served on Tri-Guy. All of the streets run from the bay to the ocean beaches.

5. On September 19, 1962, Avalon adopted Resolution 62-117 (A-185) referring to a state of emergency as a result of the March 1962 storm and also indicated for the purpose of providing protective barriers required for the protection of life and property the Mayor was authorized to contract for construction of protective barriers for the protection of life and property of the municipality. *The resolution resolved that as public safety requires, the*

owners shall be given five (5) days notice of such entry. The record contains no evidence of such notice to Tri-Guy. The resolution further stated that *the municipality shall . . . b. acquire all lands, easements, right-of-way or other areas within the municipality, if required in connection with the work undertaken.* (A-185) This resolution did not identify the affected properties or their owners or even the areas affected. This resolution was never published or served on Tri-Guy nor was Tri-Guy ever given a five day notice of entry from Avalon. Avalon never advised Tri-Guy that they were required by Resolution 62-117 to acquire their lands or an easement. More importantly, Avalon never notified Tri-Guy that they had taken Tri-Guy's property or an easement on their property.

6. The record does not reflect what activity was conducted on the Tri-Guy lots.

7. On April 29, 1965, Tri-Guy sent a letter to the Mayor of Avalon (A-181) stating that that "on April 26, we visited the lots with the intention of building a home, and we found that the sand barrier in on the property in question and we cannot, therefore, build on those lots." Tri-Guy went on to request an exchange of its lots for three other lots, but no agreement was reached regarding an exchange. Avalon did not admit a taking, at this time.

8. Avalon continued to carry the lots on its tax roll and continued to tax the lots and accept payments without ever indicating that Avalon had taken them. N.J.S.A. 54:4-31 (A-199) requires the County Clerk

to provide an abstract of every recorded deed transferring title to real property to that municipality's tax assessor, within which the property is located so that the tax collector could substitute the new grantee and send tax bills to the new grantee. Tri-Guy transferred title of the lots to its three shareholders by deed recorded on May 1, 1969 and tax bills were sent to the new grantees and paid, without any objection from Avalon or that Avalon had taken the lots. (A-135)

9. The three original Tri-Guy shareholders engaged an attorney to inquire, by letter dated July 13, 1983, if Avalon wanted to purchase the lots and Avalon responded by letter from its Administrator dated July 21, 1983, indicating that Avalon did not want to acquire the lots (A-179), but did not indicate that they had taken the lots.

10. When one of the original Tri-Guy shareholders deceased, his executrix and the other surviving shareholders transferred title to Petitioners by deed recorded on July 9, 1997 and the tax collector commenced sending them tax bills and accepting payment without ever indicating that Avalon had taken the lots. (A-140)

11. In 2002, Avalon entered into a State Aid Agreement with the New Jersey Department of Environmental Protection (DEP) regarding beach replenishment, which identified Petitioners' lots necessary to be acquired for the project, but no one told Petitioners of the need for Avalon to take the lots. (A-150) (A-173)

12. Finally, by letter dated March 16, 2001 Petitioners engaged counsel to again see if Avalon wanted to purchase the lots or permit construction on them. Petitioners never received a response from Avalon or any indication from Avalon they had taken Petitioners' lots in 1962. (A-175)

13. The first and only notice of a taking by Avalon was the filing of the Amended Answer to Petitioners' Complaint on January 3, 2005 denying Petitioners title and claiming title in Avalon by forfeiture.(A-70)

14. The Petitioners continued to be taxed and paid them for forty-three years before learning that their property had been taken by Avalon and title vested in Avalon automatically in 1962 without notice, when their right to inverse condemnation for denial of due process and just compensation were time barred in 1971, by a trial Court order and opinion entered on June 5, 2005. (A-51)

15. Avalon recorded the June 5, 2005 order and opinion of the trial Court in the County Clerk's office on July 18, 2005 claiming title to Petitioners' lots was affected by the order and vested title in Avalon as of 1962, retroactively.

PROCEEDINGS BELOW

1. Petitioners filed an inverse condemnation complaint on April 26, 2002, (A-97) claiming that Respondent Avalon had "taken" Petitioners real property as a result of physical possession and numerous ordinances over time prohibiting

development east of the dune line where Petitioners' property is located, vacating the street right- of-way and implementing a beach fee program by ordinance. Petitioners raised the 5th Amendment of the U.S. Constitution urging that their property was taken without due process and without payment of the just compensation. The Complaint also cited the New Jersey Constitution Art. 1 §1 requiring due process and Art. 1 §20 requiring just compensation for a taking and the 5th and 14th Amendments of the U.S. Constitution.

2. Respondent filed an Answer and Separate Defenses on June 10, 2004.

3. Respondent filed an Amended Answer and Counter Claim on January 3, 2005 and for the first time denied that Petitioners owned their property and that claimed it had been forfeited as a mater of law. Avalon also asserted counter claims for adverse possession, prescriptive easement and constructive easement pursuant to the "Public Trust Doctrine". (A-70)

4. Respondent, moved for Summary Judgment (prior to completion of discovery) based on N.J.S.A. 2A:14-1, a statute limiting the time within which an aggrieved party must assert a cause of action listed in the statute or lose the right to do so. (A-190)

5. The trial Court then identified a letter dated April 29, 1965 from Tri-Guy to the then Mayor of Avalon, (A-181) which stated: "On April 26, we visited the lots with the intention of building a home,

and we found a sand barrier on the property in question and we cannot, therefore, build on the lots." and concluded that Tri-Guy knew that its property had been taken. (A-181) The Judge correctly held that Petitioners did not dispute the letter, but he incorrectly implied that Petitioners understood their property had been taken in the legal sense or that title to their property would automatically vest in Avalon after six years.

6. The trial Court applied N.J.S.A. 2A:14-1 to Petitioners' inverse condemnation cause of action for the taking of real property without due process or just compensation, ruling that it time barred the complaint in 1971, even though Petitioners' cause of action was not mentioned in the text, until a 3rd Circuit Court of Appeals in 1996 judicially amended the plain language of the statute to include inverse condemnation, even though not mentioned. (A-51)

7. The trial Court entered an order dated June 5, 2005 dismissing Petitioners' claims, with prejudice. The Judge did not address the issue of title to the property. All of Avalon's counterclaims for adverse possession, prescriptive easement and a public trust doctrine easement were dismissed by the trial Court.

8. Avalon's attorney, recorded the trial Court's order and opinion in the Cape May County Clerk's office on July 18, 2005 certifying that they affected title to the property taken by Avalon by Resolution 62-102 and 62-103 and automatically vested title in Avalon as of August 15, 1962, (citing N.J.S.A. 46:16-1.1, as

the authority for recordation) without any notice to Petitioners, since the statute required none. (A-51)

9. Petitioners appealed to the Appellate Division of the Superior Court on July 19, 2005, unaware of the recordation of the order and opinion in the County Clerk's office.

10. Petitioners learned of the recordation vesting title in Avalon in October 2005, but the Appellate Division had jurisdiction and thus, Petitioners were unable to address title with the trial Court or Appellate Division. Consequently, Petitioners entered into a tolling agreement, which specifically preserved the issue of automatic vesting of title until after all appeals. (A-64)

11. The Appellate Division decided the first appeal on April 30, 2007 and held *that the physical taking of real property by a government agency, without compliance with the statutory safeguards established by the Legislature for the lawful exercise of the power of eminent domain, constitutes an act of inverse condemnation and that a cause of action against a governmental defendant to recover the value of the real property that was taken by inverse condemnation is governed by N.J.S.A. 2A:14-1 and must be commenced within six years from the date of accrual, which is defined as the date the landowner becomes aware or, through the exercise of reasonable diligence should become aware, that he or she had been deprived of all reasonably beneficial use of the property* and affirmed the trial Court decision. (A-29)

While the Appellate Division decision claimed that the Respondent, Avalon's lot exchange program was adopted in 1962, that finding is not supported by the record. Tri-Guy exchanged lots acquired from Avalon in 1961. Nothing in the record suggests that Avalon advised Tri-Guy of a physical taking or that the lot exchange program was designed to provide just compensation for a taking. Moreover, the decision confirms that property owners were required to continue paying taxes and Petitioners and their predecessors paid the taxes until the recordation. (A-29) (Taxes paid have never been refunded.)

The Appellate Division also confirmed that Tri-Guy deeded the subject property in 1969 to the three shareholders. (A-29)

The Appellate Division also found that by letter, dated July 21, 1983 from Respondent, Avalon, to the attorney representing the shareholders that it was *not interested in purchasing the property*. (A-29)

The Appellate Division also recognized the sale by the two remaining shareholders and the Executrix of the Estate of the third shareholder on June 14, 1997 to Petitioners, but ignored their rights under N.J.S.A. 46:22-1 that provided protection against unrecorded claims of title. (A-29)

The Appellate Division recognized the March 16, 2001 letter to Respondent, Avalon offering the property for sale to anyone or Avalon and

alternatively requesting a permit to construct of a single family residence on Petitioners' lots. (A-29)

12. The New Jersey Supreme Court denied Petitioners appeal and request for certification on September 7, 2007 without comment. (A-27)

13. Pursuant to a tolling agreement, on March 24, 2008 (A-64), Petitioners filed a motion to expunge the July 18, 2005 recordation of the trial Court's order and opinion dated June 6, 2005. The trial Court motion Judge acknowledged that neither the recorded order nor opinion dealt with the issue of title, but he proceeded to deny the motion on April 25, 2008 and sua sponte, without notice to Petitioners, amended Avalon's Complaint and granted Declaratory Judgment, in favor of Avalon (A-18), even though Avalon never asserted a claim for legal title under the Eminent Domain Act or requested a declaratory judgment in its counterclaims.

14. Petitioners second appeal to the Appellate Division was denied on July 28, 2009. (A-3)

15. Petitioners' appeal and petition for certification to the New Jersey Supreme Court was denied on June 30, 2010, without comment. (A-1)

16. Petitioners' motion for reconsideration was denied by the New Jersey Supreme Court by order filed on October 7, 2010, without comment. (A-62)

REASONS FOR GRANT OF CERTIORARI

I. THE LAW AS APPLIED TO THIS CASE CONFLICTS WITH *U.S. V. CLARKE,* WHICH HELD THAT FORMAL CONDEMNATION IS THE CONDEMNOR'S WAY TO ACQUIRE TITLE AND THAT INVERSE CONDEMNATION WAS FOR PROPERTY OWNERS TO OBTAIN JUST COMPENSATION NOT FOR THE CONDEMNOR TO OBTAIN TITLE.

A. In *U.S. v. Clarke*, 455 U.S. 253, 100 S.Ct. 1127 (1980) this Court held that 25 U.S.C. 357 meant that the term condemned in the statute referred to a judicial condemnation proceeding and did not authorize condemnation by "physical occupation". *Id. at 253 & 1128* This Court further held that the lands could only be acquired in a formal condemnation action by condemnor. *Id. at 254 & 1128.* Thus this Court reversed the 9th Circuit Court of Appeals decision that permitted acquisition by inverse condemnation. *Id. at 255 & 1129.*

In support of this ruling, this Court explained that a condemnation is an action filed by the condemnor to effect a taking and "acquire title" and that an inverse condemnation is a cause of action filed by the property owner against a governmental agency to recover the "value of the property". *Id. at 255 & 1129, 256 & 1129 and 257 & 1130.* While the decision clearly shifted the burden of discovery of a taking to property owners, it did not say that failure to discover the taking should relieve the condemnor of liability or that there must be a statute of limitation for an inverse condemnation action based on lack of due process and denial of just

compensation. Moreover, no rule should favor the condemnor that violates the U.S. Constitution.

U.S. v. Clarke does not authorize the automatic vesting of title in Avalon, let alone by reason of a retroactive application of a statute of limitation judicially amended in 1996 to time bar inverse condemnation for a taking of real property without due process or just compensation.

II. THE TWO TRIAL COURT, TWO APPELLATE DIVISION DECISIONS AND THREE SUPREME COURT ORDERS DENIED PETITIONERS DUE PROCESS BY RETROACTIVELY APPLYING N.J. DECISIONAL LAW THAT DID NOT INTERPRET N.J.S.A. 2A:14-1 TO INCLUDE INVERSE CONDEMNATION FOR A TAKING OF PROPERTY WITHOUT DUE PROCESS OR JUST COMPENSATION UNTIL 1996.

If Tri-Guy or its successors had consulted an attorney between 1962 and 1996, that attorney would have found the 5th and 14th Amendments to the U.S. Constitution and Art 1 §1 and §20 of the N.J. Constitution, which both prohibit a taking of real property without due process or payment of just compensation. He also would have found N.J.S.A. 20:1-1 *et seq*. (Eminent Domain Act in force until 1971 (A-190) when it was repealed and replaced by N.J.S.A. 20:3-1 et. seq.) and N.J.S.A. 20:3-5 & 6, (A-191) both of which clearly provide a *mandatory* due process course of action for Avalon to acquire legal title to real property and pay just compensation to the property owner.

The attorney would have reviewed N.J.S.A. 2A:14-1 (A-190) and found that while it time limited a taking of personal property, it made no mention of taking real property or inverse condemnation for a taking of real property without due process or just compensation.

This attorney would have easily concluded that due process under the New Jersey and U.S. Constitutions requires use of the Eminent Domain Act by Avalon to acquire real property.

If the Attorney then reviewed decisional law, he would have found *Watson v. Jersey City*, 84 N.J.L. 422, 423, 86 A. 402 N.J. (E & A 1913) that found no time limit on collection of a just compensation judgment and *Morey v. Essex County*, 94 NJL 427, 428, 110 A. 905 (E & A 1920), which characterized Essex County's use of a strip of Plaintiff's land for road widening as a continuous trespass, time limited to the last six years prior to the property owners suit for compensation for trespass.

Consequently, the U.S. Constitution, Eminent Domain Act (EDA) and decisional law would not have alerted Petitioners to a possible loss of due process and just compensation, if a taking had occurred between 1962 and 1971. The most that one could have been discerned from such inquiry is that Avalon might be guilty of a trespass and damages limited to the last six years prior to suit.

On June 25, 1982, *Harisdan v. City of East Orange,* 187 N.J. Super. 65, 69, 453 A. 2d 888, 890 (A.D. 1982) held that a declaration of blight was not a tortious act or injury for limitation purposes and no cause of action accrued as the date of the declaration of blight.

In the matter of *Russo Farms, Inc. v. Vineland Board of Education*, 280 N.J. Super. 320, 325, 655 A 2d 447, 450 (A.D.1995), the Court held that flooding from construction of a school caused crop damage on an adjacent privately owned property and was a continuing nuisance, time limited to the last six years by N.J.S.A. 2A:14-1 affirmed in part and reversed in part, 144 N.J. 84, 675 A. 2d. 1077 (1996) (issue not raised on appeal).

Subsequently, on November 27, 1996, the Third Circuit Court of Appeals decided 287 *Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320, (1996), and held that an inverse condemnation action under the 5th Amendment is subject to N.J.S.A. 2A:14-1, and stated that "Although the statute does not explicitly reference inverse condemnation actions, New Jersey decisional law indicates it is the proper statute of limitations in such cases." *Id. at 324.* Citing *Russo Farms, Inc. v. Vineland Board of Education* 280 N.J. Super. 320, 325, 655 A 2d 447, 450 (A.D.1995) a continuing nuisance case and *Harisdan v. City of East Orange* 187 N.J. Super. 65, 69, 453 A. 2d 888, 890 (A.D. 1982) a continuing trespass case. This ruling judicially amended the statute to time bar an inverse condemnation action for a taking of real

property without due process or just compensation, even though not mentioned in the statute.

Even if, Petitioners or their predecessors knew of the case, they would not have known that this new 1996 judicial amendment would be retroactively applied to their inverse condemnation claim.

III. THE NEW JERSEY SUPREME COURT DENIED THE PETITIONERS' RIGHT TO EQUAL PROTECTION GUARANTEED BY THE 14TH AMENDMENT BY FAILING TO GRANT EQUITY TO PETITIONERS BASED ON *KLUMPP V. AVALON* DECIDED JUNE 22, 2010, BEFORE DENYING PETITIONERS' APPEAL ON JUNE 30, 2010 AND MOTION FOR RECONSIDERATION ON OCTOBER 7, 2010.

Klumpp v. Avalon, 202 N.J. 390, 997 A 2d 967 (2010) is a companion case to *Raab and Montagna v. Avalon* their appeal and petition for certification was before the N.J. Supreme Court at the same time and was decided June 22, 2010, 8 days prior to the denial of Petitioners appeal. The N.J. Supreme Court accepted the Appellate Division's finding that *Klumpp's* land was taken by physical seizure in 1962 in the aftermath of the March, 1962 northeast storm *(id. at 403 & 974)* that also devastated Petitioners' property one block north. However, after confirming the earlier decisional law adding inverse condemnation for a taking of real property without due process or just compensation to N.J.S.A. 2A:14-1, *Id. at 409 & 978* (in spite of the plain language

rule of statutory interpretation) and then denied Avalon its benefit, because of the concealment of a taking from the *Klumpps* was not equitable. *Id. at 414 & 981.* However, equity should have motivated the Court to set the date of compensation as the date its opinion. As it stands, Avalon violated the constitutional rights of the *Klumpps*, but received more equity than the *Klumpps*, when it set the date of taking as 1962, in spite of a long standing universal rule that denies equity to one without clean hands.

The facts are virtually the same as those in Petitioners case, except for that Court's claim that Avalon had directly notified Tri-Guy of the land swapping program is not supported by anything in the record. In 1961, Tri-Guy was asked, by Avalon, to swap lots they owned on 9th Street in Avalon, which were eroding, for the lots subject to Petitioners' action (A-126 and A-131the deeds used for the swap or exchange.) and that is how they knew of the lot exchange program. Nothing in the record below even suggests that the program was created to compensate takings by Avalon and there is no proof that Avalon suggested to Tri-Guy that was the reason the land swap or exchange program was created.

Likewise, there is no proof in the record that Tri-Guy understood Avalon had effected a taking of their lots or that title would automatically vest in Avalon by virtue of N.J.S.A. 2A:14-1, judicially amended in 1996 to time limit an inverse condemnation action for at taking without due

process or just compensation. Neither Avalon nor Petitioners could know of the time limit prior to 1996 and could not have known that it would be retroactively applied to a 1962 taking.

The N.J. Supreme Court made a cogent observation about the process:

> "Although physical invasion and physical taking of real property by a governmental entity ought to be notice sufficient to awaken property owners to act to protect their interest in receiving compensation for the taking, *government also should provide some other form of notice to affected property owners before, and surely after, a physical taking. It should go without saying that turning such square corners is minimally what citizens should be able to expect from their government when such drastic action is visited on property owners.*" *Id. at 413 & 980.*

So after realizing the due process need for notice, the Court failed to require such "other form of notice" to both the *Klumpps* and Petitioners.

IV. THE N. J. APPELLATE DIVISION RECENTLY SOLVED A DUE PROCESS LACK OF NOTICE PROBLEM AND THE *DeROSE* SOLUTION SHOULD BE UTILIZED TO PROTECT PETITIONERS' RIGHT TO DUE PROCESS.

In 2008, the N.J. Appellate Division decided *Harrison Redevelopment Agency v. DeRose,* 398 N.J. Super. 361, 942 A. 2d 59 (A.D. 2008) interpreting a due process challenge to the validity of the Local Redevelopment and Housing Law (LRHL) (N.J.S.A. 40A:12-1 *et seq.*) and in particular N.J.S.A. 40A:12A-6.a., b.(2) and b.(3).

This statute requires publication of a notice to all affected property owners or all persons interested in the proposed boundaries, once a week for two weeks at least ten days prior to a planning board hearing on consideration of a proposed redevelopment of an area and notice also mailed to the last known owner of each parcel within the proposed redevelopment area at least ten days prior.

However, it does not require the "municipal governing body to provide individual advance notice to an owner that it is considering designating his or her property for redevelopment, and thus may take that property in the future through the power of eminent domain. *Id. at 367 & 62.* Nor are property owners entitled under L.R.H.L. to individual notice after a governing body approves such a designation, unless the owner had previously filed a written objection while the proposed redevelopment plan was being preliminarily evaluated by the local planning board". *Id. at 367 &62.*

> The Appellate Division thereafter, held that: "unless a municipality provides the property owner with contemporaneous written notice that

> fairly alerts the owner that 1) his or her property has been designated for redevelopment, 2) the designation operates as a finding of public purpose and authorizes the municipality to acquire property against the owner's will, and 3) informs the owner of the time limits within which the owner may take legal action to challenge that designation, an owner constitutionally preserves the right to contest the designation, by way of affirmative defense to an ensuing condemnation action. Absent such adequate notice, the owner's right to raise such defenses is preserved, even beyond the forty-five days after the designation is adopted." *Id. at 367, 368 & 62, 63.*

The Appellate Division further stated:

> By so ruling, we endeavor to harmonize the terms and objectives of the L.R.H.L. with those of the Eminent Domain Act, N.J.S.A. 20:3-1 to 50, and our Rules of Court. Such a harmonized reading of the applicable statutes and rules also ensures that our redevelopment laws pass muster under the Due Process Clause of the Federal Constitution and separation of powers principles under the State Constitution. It also relieves property owners and the public at large of the burdens of engaging in premature litigation, so that owners are not forced

> to go to court unless and until they received fair and adequate notice of the municipality's adverse determination and of its right to take their properties. *Id. at 368 & 369 & 63.*

Petitioners urge this Court to impose a written notice requirement to property owners of a taking in order to avoid the confusion in this case and ensure due process for all.

V. THE FACTS OF THIS CASE SUPPORT TWO ENTIRELY DIFFERENT CONCLUSIONS ABOUT WHETHER AVALON TOOK PETITIONERS' PROPERTY.

A. The trial Court and Appellate Division decisions concluded that Avalon intended to take and did take Petitioners' land in 1962, without just compensation, and that Petitioners knew that by April 29, 1965 and had an obligation to take action within six years by April 29, 1971 or be time limited by N.J.S.A. 2A:14-1.

In order to believe this result, one must believe that Avalon intentionally violated the New Jersey and U.S. Constitutions and the mandatory requirements of the Eminent Domain Act (N.J.S.A. 20:3-5 and 6) and therefore, denied Petitioners' "just compensation" and "due process". Moreover, one must also believe that Avalon went to extraordinary effort to conceal their illegal, unconstitutional and fraudulent conduct from Petitioners and their predecessors in title by pretending Petitioners still

owned the property, a myth perpetuated by Avalon's 1) continuous taxation of the property, 2) non objection to the subsequently recorded deeds, 3) failure to inform Petitioners' predecessors of a taking when their attorney inquired about sale to Avalon in 1982, 4) listing Petitioners property as necessary to be acquired in the 2002 State Aid Agreement (A-150) and 5) failure to inform Petitioners' attorney in 2001 that Avalon owned the lots as of 1962.

One would have to believe that Avalon intentionally engaged in a fraudulent scheme designed to trick Petitioners and their predecessors in title into believing they still owned the property, so that Avalon would not be sued for a taking without due process, just compensation and continuing the concealment for about 43 years, until January 3, 2005, when the Amended Answer by Avalon denied Petitioners' ownership and asserted that title had been forfeited by operation of law.

One has to believe that when Tri-Guy wrote to Avalon in 1965, it understood Avalon had taken the property and noticed itself that it had six years to sue under N.J.S.A. 2A:14-1, which did not list inverse condemnation, for a taking of real property without due process or just compensation as a time limited cause of action.

One would also have to believe that Petitioners and their predecessors in title were foolish enough to continue paying taxes, transfer title twice by deed in 1969 and 1997 and hire an

attorney, if they knew that Avalon already owned the property.

One would also have to believe that Petitioners had the ability to foresee that the 3rd Circuit Court of Appeals would add language to N.J.S.A. 2A:14-1, in 1996 time barring an inverse condemnation action for a taking real property, without due process or just compensation, because of a judicial policy favoring time limiting even though the statute plainly did not include the added language.

B. Alternatively, Avalon did not ever take Petitioners' property until the recordation of the first trial Court order and opinion dated June 5, 2005 in the County Clerk's office on July 18, 2005 (A-51) or the date the second trial Court motion order and opinion declared Petitioners' title automatically vested in Avalon and validated the July 18, 2005 recordation claiming title for Avalon as of 1962 by reason of automatic vesting. (A-18)

Resolution #62-102 indicated that Avalon's conduct could be a taking for which just compensation would not be denied or a police power action for which no compensation would be paid. (A-183)

Resolution #62-117 stated that Avalon shall acquire all land or easements required for constructing protective barriers. Since Avalon did not condemn the Petitioners' property, one could conclude Avalon's conduct was a valid police power

action so notice of taking was not necessary and also Avalon did not need Petitioners' lots for the construction of protective barriers, so no notice of taking was necessary. (A-185)

Keep in mind that Avalon's cleanup and beach replenishment benefited the property owners and was not proof of a taking if it was a police power action.

Moreover, N.J.S.A. 2A:14-1 was not judicially amended to time bar Petitioners' cause of action until 1996, so Avalon could not have known the statute would bar the claim in 1971.

In order to believe there was no taking in 1962 one need only remember that Avalon never took action to acquire Petitioners' property by the Eminent Domain Act or by any other cause of action. That explains why Avalon 1) continued taxing the lots and accepting payment without objection, 2) changed its tax assessment rolls to reflect new ownership of the lots without objection, 3) never told the attorneys for Petitioners or their predecessors that Avalon owned the lots, 4) listed the lots to be acquired in the 2002 state aid agreement and 5) only claimed title by forfeiture in the Amended Answer dated January 3, 2005.

CONCLUSION

1. Avalon never noticed Tri-Guy or Petitioners of a taking. Avalon had a mandatory due process obligation to notice a condemnee of a taking.

Avalon's Resolution #62-102 indicated Avalon's action was either a taking or a valid police action and Avalon had an obligation to inform property owners, if they took their property.

2. Avalon's conduct of taxing, accepting payment and not informing the property owner's attorney of a taking concealed a taking, if one actually occurred.

3. Judicial amendment of N.J.S.A. 2A:14-1 in 1996 was not warranted in light of the plain language of the statute, the U.S. and N.J. Constitutions and the N.J. Eminent Domain Act.

4. Retroactive application of a judicially amended N.J.S.A. 2A:14-1 denied due process and just compensation.

5. Avalon's fraudulent concealment of an alleged taking does not warrant any saving grace by equity and was inequitable treatment of Petitioners.

6. The N.J. Courts' concept of automatic vesting of title upon expiration of a time limit for filing a complaint conflicts with the time honored goal of this State's land title recording system designed to create an accurate up to date record of grantees.

7. Avalon first advised Petitioners or their predecessors in title of a physical seizure of their lots in 2005, when it filed an amended answer to the complaint on January 3, 2005 denying Petitioners ownership and indicating that their lots were forfeited, thereby denying Petitioners due process.

8. This concept also conflicts with Federal and State statutory law requiring notice of seizure and forfeitures under criminal statutes, therefore, protecting the constitutional rights of criminals while denying constitutional rights of law abiding citizens in light of illegal and fraudulent conduct by a condemnor like Avalon.

In closing, Petitioners urge that this Court protect the Constitutional rights of innocent property owners from the loss of due process and just compensation rather than approving an automatic vesting of title while ignoring the Eminent Domain Act that is designed to ensure due process. This Court should not strip innocent property owners of their constitutional rights, especially in light of Avalon's fraudulent conduct of concealment of a taking, if one actually occurred.

If left to stand, the decision below will set a bad precedent and that will be utilized by both other public entities in New Jersey and other states to avoid their Constitutional obligation to pay just compensation.

This Court could reverse the finding of a taking based on Avalon's failure to admit a taking and its conduct of taxing the lots and the lack of evidence of an intent to take the property or alternatively rule that if a taking occurred, it was on July 18, 2005 when the trial Court order and opinion dated June 5, 2005 was recorded in the County Clerk's office or alternatively, this Court could consider imposing the "*DeRose*" solution ordered in *Harrison Redevelopment Agency v. DeRose* and require a

personal written notice of a taking without due process or just compensation and preserve the land owner's rights until a formal condemnation is filed, if no due process notice is given.

Respectfully submitted

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SUPREME COURT OF NEW JERSEY
C-478 September Term 2009
064721

HENRY E. RAAB AND
CLARA V. MONTAGNA,
PLAINTIFFS-PETITIONERS,

AND

BOROUGH OF AVALON,
DEFENDANT/THIRD PARTY
PLAINTIFF-RESPONDENT,

ON PETITION FOR CERTIFICATION

V.

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
THIRD-PARTY DEFENDANT-
RESPONDENT.

[DATE STAMP]
FILED
JUN 30 2010
/s/ CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-004735-07 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 29th day of June, 2010.

/s/
CLERK OF THE SUPREME COURT

The foregoing is a true copy
of the original on file in my office.
/s/
CLERK OF THE SUPREME COURT
OF NEW JERSEY

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4735-07T3

HENRY E. RAAB AND
CLARA V. MONTAGNA,

Plaintiffs-Appellants,

v.

BOROUGH OF AVALON,

Defendant/Third-Party
Plaintiff-Respondent,

v.

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Third-Party Defendant-
Respondent.

Argued May 18, 2009 - Decided July 28, 2009

Before Judges Lisa and Sapp-Peterson.

On appeal from the Superior Court of

New Jersey, Law Division, Cape May County, Docket No. L-257-02.

Frederick W. Schmidt, Jr. argued the cause for appellants.

Michael J. Donohue argued the cause for respondent Borough of Avalon (Gruccio, Pepper, DeSanto & Ruth, P.A., attorneys; Mr. Donohue, of counsel and on the brief).

Lewin J. Weyl, Deputy Attorney General, argued the cause for respondent New Jersey Department of Environmental Protection (Anne Milgram, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mr. Weyl, on the brief).

PER CURIAM

In *Raab v. Borough of Avalon*, 392 N.J. Super. 499, 502-03 (App. Div.), *certif. denied*, 192 N.J. 475 (2007), a panel of this court affirmed the summary judgment dismissal of plaintiffs' claims against the Borough of Avalon (Borough) which sought compensation for the physical taking of their property and damages under 42 U.S.C.A. § 1983. The issue in that case was a determination of

> the applicable limitation period within which a private party must commence an

> action to challenge the taking of private property by a public entity, as an exercise of its police power, where the public entity's actions fail to comply with any of the statutory provisions governing the use of eminent domain.

Id. at 502. We held "that the physical taking of real property by a governmental agency, without compliance with the statutory safeguards established by the Legislature for the lawful exercise of the power of eminent domain, constitutes an act of inverse condemnation." *Id.* at 503. We further held

> that a cause of action against a governmental defendant to recover the value of the real property that was taken by inverse condemnation is governed by the provisions of N.J.S.A. 2A:14-1 -2, and must be filed within six years from the date of accrual, which is defined as the date the landowner becomes aware... that he or she has been deprived of all reasonably beneficial use of the property."

Ibid.

The dispute involved several beachfront lots in the Borough owned by plaintiffs' predecessors. A major storm in March 1962 obliterated the lots. The Borough enacted a series of resolutions in the aftermath of the storm authorizing it to enter upon the beachfront

properties from 13th Street to 80th Street, to clear debris, and to immediately construct a protective barrier in the form of sand dunes along the beachfront. Plaintiffs' lots were included within this area. Borough officials and contractors, in compliance with the authorizing resolutions, embarked upon the construction of a protective dune system for the protection of the barrier island on which the Borough is located and for the benefit of the general public and the promotion of the health and welfare of the community.

In November 1962, the Borough instituted a property-exchange program as a means of compensating property owners whose lots had been destroyed by the storm. Plaintiffs' predecessors engaged in negotiations with the Borough under this program, seeking to exchange their destroyed lots for others owned by the Borough. In a letter to the Borough dated April 29, 1965, plaintiffs' predecessors acknowledged that they had visited the lots on April 26, 1965, observed the dune system that had been constructed, were aware that they could not build on the lots, and requested exchange of their lots for property of comparable value owned by the Borough. That letter conclusively established that by April 29, 1965, plaintiffs' predecessors knew that the Borough had seized their property and that they had been deprived of all reasonably beneficial use of the property.

Through their efforts to participate in the property-exchange program, plaintiffs sought

compensation for the taking of their property by the Borough. The negotiations proved unsuccessful, and no further efforts were made to resolve the dispute for several decades. During that time, the lots continued to be carried on the Borough tax records as owned by plaintiffs or their predecessors, and two conveyances were made, one from the corporate entity that had owned the lots at the time of the storm to its three principals, and another when one of the principals died to his widow. Thus, there were no innocent third parties involved here. The knowledge of plaintiffs' predecessors was properly imputed to plaintiffs. The consideration for the conveyance to the deceased member's spouse was $70. The taxes were less than $2 per year.

In the first phase of this action, Judge Visalli granted summary judgment to the Borough and third-party defendant New Jersey Department of Environmental Protection on statute of limitations grounds. He held that plaintiffs' claim for compensation arising from inverse condemnation was six years, and for its § 1983 claim, it was two years. He concluded that plaintiffs' cause of action accrued no later than April 29, 1965. He therefore found their claims time barred and entered a final judgment granting defendant's motion to dismiss. That judgment was entered on June 6, 2005. On July 18, 2005, the Borough recorded the judgment and accompanying written opinion rendered by Judge Visalli in the Cape May County clerk's office pursuant to N.J.S.A. 46:16-1.1.

Plaintiffs appealed, and in our prior decision we affirmed. *Raab, supra*, 392 N.J. Super. at 509. We agreed with Judge Visalli's analysis and ultimate conclusion and concluded "that the Borough's actions in physically appropriating plaintiffs' property constituted a 'taking.'" *Id.* at 510. Further, because the Borough did not follow the procedures required for an eminent domain proceeding, the Borough's action "is viewed as an inverse condemnation, shifting the burden to the aggrieved landowner 'to discover the encroachment and to take affirmative action to recover just compensation.'" *Ibid.* (quoting *United States v. Clarke*, 455 U.S. 253, 257, 100 S. Ct. 1127, 1130, 63 L. Ed. 2d 373, 378 (1980)). We further concluded that "the taking was complete when the Borough came upon the property; took exclusive possession of it; and through a series of municipal resolutions, appropriated, transformed, and built upon the property to accomplish its express public purpose: the restoration and protection of the shoreline." *Id.* at 513.

After the conclusion of the appellate process, plaintiffs filed a motion with the trial court seeking to reopen the case. More particularly, the motion was "to open case, clarify final judgment and order and expunge and vacate recordation of final judgment and opinion in Cape May County Clerk's records." Essentially, plaintiffs contended that the first phase of the action, including the issues decided on appeal, dealt only with the Borough's possession of the property, and not legal title to the property. Plaintiffs argued that the recording statutes protected their title ownership, which was paramount to any claim of title

by the Borough.

Judge Visalli rejected the argument and issued a written opinion on April 25, 2008 denying plaintiffs' motion. The judge explained his decision this way:

> Plaintiffs contend that the Order on its face grants no affirmative relief to Avalon, but simply dismisses Plaintiffs' Complaint. As to Plaintiffs' Cross-Motion on Avalon's Counterclaims, this Court made no substantive ruling but only stated that "Plaintiffs' Cross-Motion are (sic) therefore denied." The crux of this Motion centers upon Plaintiffs' contention that the Final Judgment and Opinion did not affect title to Plaintiffs' real property.
>
> Plaintiffs dispute that... Avalon acquired legal and recordable title to the property in question as a result of the granting of Summary Judgment. Specifically, Plaintiffs contend that this Court's finding that Avalon took physical possession of Plaintiffs' property in 1962 is, was not and cannot be a finding that such physical possession of property was tantamount to Avalon having acquired legal and recordable title to property.
>
> Defendants contend that Plaintiffs are barred from making this application

which Defendants contend is in complete disregard for the Judgment of this Court, the Judgment of the Appellate Division, res judicata, collateral estoppel, the law of the case and the strong judicial and public policy interests in the finality of judgments.

As noted by Defendants this matter was brought before the Appellate Division. The Appellate Division specifically states that "this appeal requires us to determine the applicable limitation period within which a private party must commence an action to challenge the taking of private property by a public entity, as an exercise of its police power, where the public entity's actions fail to comply with any of the statutory provisions governing the use of eminent domain." Based upon this focus of the Appellate Division, Plaintiffs take the position that the Appellate Division did not consider the issue of who has legal and recordable title to the disputed property.

However, the decision is not limited to the statutory limitation and does in fact address issues of possession. In the second to last paragraph of the Appellate Division's opinion the Court states "Here, the taking was complete

when the Borough came upon the property; took exclusive possession of it; and through a series of municipal resolutions, appropriated, transformed, and built upon the property to accomplish its express public purpose: the restoration and protection of the shore line. All this was accomplished in 1965. Thus, there is no factual support for applying the "continuing wrong" doctrine to rescue plaintiffs from the legal consequences of their deliberate inactions."

This Court also acknowledges that Plaintiffs similarly presented the issues raised in this Motion to the Appellate Division. Specifically, Plaintiffs argued as follows: "Avalon makes much of the fact that Plaintiffs, alleging improperly, have told this Court that Avalon recorded the order at issue on this appeal and treated that order as an order transferring title in the Property from the plaintiffs to Avalon. Avalon claims that informing this Court of what Avalon perceives to be the full legal effect of the ruling below (the transfer of title from an uncompensated owner to a governmental entity) is "wholly improper."

The Appellate Decision in this case was published on April 30, 2007. This

motion now almost one year later seeks to open the final judgment to clarify and for other relief. Consistent with Plaintiff's conduct throughout this litigation the delay of one year to seek relief is extraordinary especially when these same issues have been presented in the briefing in the Appellate Court.

The decision of this Court as affirmed by the Appellate Court is that the Plaintiffs are barred from seeking just compensation based on the six year Stat[ut]e of Limitations and the continuous emergency possession of the property by the Borough since 1962. While it is true that the title question was never argued, briefed or decided in the prior proceedings, it is the clear implication of that decision that title vested in the Borough of Avalon in April of 1971 upon the failure of the Plaintiff to seek just compensation.

Most likely the Borough should have brought an action for a Declaratory Judgment to clear title. Given the subsequent decisions of this Court, it is certain that clear title would have vested in the Borough at any time after the Statute of Limitations expired in April of 1971 and this Court now so declares. The Court further determines that the

> recording of the June 2005 Order and Opinion of this Court is proper to transfer title under the facts of this case.
>
> Based on this holding in the Appellate Division this Court is satisfied that Avalon now owns the property and has title by way of the taking and that Plaintiffs' ownership interests are extinguished. This matter has already been properly adjudicated and, therefore, Plaintiffs' Motion is denied.

On the same date, the judge issued a corresponding order denying plaintiffs' motion in all respects. The judge also appended a handwritten endorsement on the order, adding that "a Declaratory Judgment is granted in favor of the Borough of Avalon for the property in question and the Recordation of the Judgment of June 6, 2005 is found valid & vests title in the Borough of Avalon."

Plaintiffs appeal and make these arguments:

POINT I

PLAINTIFFS' RIGHT TO TITLE IS PROTECTED BY THE LAND TITLE RECORDING SYSTEM FROM THE RECORDATION OF THE TRIAL COURT'S OPINION.

POINT II

AVALON HAS NOT ACQUIRED TITLE TO THE PROPERTY, BECAUSE IT FAILED TO COMPLY WITH STATUTORY PREREQUISITES.

a) The U.S. and New Jersey Constitutions prohibit taking of property without "just compensation."

b) The mandatory procedure for taking property in New Jersey is set forth in the Eminent Domain Act.

c) After the March 1962 storm, the legislature provided authority for shore municipalities to deal with such emergencies.

d) Avalon never advised Plaintiffs that their land had been seized in 1962 or that they had to file an action for compensation within six years and continued taxation of the lots and acceptance of payment and their negotiations with Plaintiffs and their predecessors indicated that Plaintiffs still owned the land.

POINT III

THE "TAKING CONTROL AND POSSESSION" OF PLAINTIFFS' LAND DOES NOT VEST TITLE IN AVALON.

POINT IV

AVALON HAS CONTINUED TO IGNORE THE MANDATE OF N.J.S.A. 20:3-5 AND 6 TO ACQUIRE LEGAL TITLE TO PLAINTIFFS' LAND PURSUANT TO THE EMINENT DOMAIN ACT AND THEREFORE, VIOLATED PLAINTIFFS' RIGHT TO "DUE PROCESS."

POINT V

AVALON IS TIME BARRED BY N.J.S.A. 2A:14-1 FROM SEEKING LEGAL TITLE TO PLAINTIFFS' PROPERTY BASED ON RESOLUTION #62-102, 103 AND 117 AND AVALON'S TAKING OF "CONTROL AND POSSESSION" OF PLAINTIFFS' PROPERTY IN 1962.

POINT VI

AVALON'S RECORDATION OF THE FINAL JUDGMENT AND OPINION SHOULD BE EXPUNGED AND VACATED AS MATTER OF PUBLIC POLICY CONCERNING THE INTEGRITY OF OUR LAND TITLE RECORDING SYSTEM.

POINT VII

THE CONDUCT OF AVALON CONSTITUTES THEFT BY DECEPTION AND/OR FRAUD AND MISREPRESENTATION THAT JUSTLY REQUIRES THIS COURT TO VACATE AND EXPUNGE AVALON'S RECORDATION.

In our view, plaintiffs' arguments are nothing more than an effort to re-litigate issues already adjudicated. We agree with Judge Visalli' s analysis and agree that it follows from the earlier opinion of this court that legal title vested in the Borough as a result of the inverse condemnation that occurred. As the judge stated, it would have been the better practice for the Borough to have filed a timely declaratory judgment action to settle the issue of record. Failure to do so, however, does not change the legal effect of what has transpired in this case and upon which this court has previously ruled.

Therefore, we will not address here the claims based upon payment of taxes over the years, failure of the Borough to have followed the statutory procedures for an eminent domain proceeding, failure of the Borough to have identified specific lots, as opposed to more generally defining the area taken as the beachfront strip between 13th Street to 80th Street, and the like. We have already rejected these arguments in the prior appeal.

We reject plaintiffs' argument that Judge Visalli improperly granted the Borough a declaratory

judgment, even though the Borough did not request it. Plaintiffs' motion placed before the court the issue of title and sought a review of the documents recorded by the Borough as proof of their title interest. Having done so, the issue was properly before the court, and plaintiffs should not be permitted to complain that the very issue they raised was decided by the court. There was no prejudice or surprise involved. All parties were well aware that this was the issue being litigated in plaintiffs' post-appeal motion.

Plaintiffs' remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated by Judge Visalli in his written decision of April 25, 2009.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.
/s/
CLERK OF THE APPELLATE DIVISION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

[DATE STAMP]
FILED APR 25 2008
Office of the Superior Court Clerk
By Deputy Clerk of the Superior Court
HOWARD H. BERCHTOLD, JR.
CAPE MAY COUNTY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: Michael J. Donohue, Esquire
1956 Route 9 North - Suite B
Clermont, NJ 08210-1160

Frederick W. Schmidt, Esquire
106 North Main Street, Unit D
P.O. Box 120
Cape May Court House, NJ 08210

Lewin Weyl, DAG
Hughes Justice Complex
25 Market Street
P.O. Box 0093
Trenton, NJ 08625-0093

CASE: Henry E. Raab et al v Borough of Avalon

DOCKET NO: CPM L 257-02

NATURE OF APPLICATION: Plaintiff's Motion to Open Case, Clarify Final Judgment and Order and Expunge and Vacate Recordation of Final Judgment

MEMORANDUM OF DECISION ON MOTION PURSUANT TO RULE 1:6-2(F)

Having carefully reviewed the moving papers and any response filed, I have ruled on the above motion as follows:

Plaintiffs Henry Raab and Clara Montagna request an Order to Open Case, Clarify Judgment and Expunge and Vacate the Recordation of Final Judgment and Opinion in this matter.

For purposes of this Motion this Court will apply the standard articulated in Rule 4:50-1 pertaining to vacating judgments. Rule 4:50 provides that "...the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect.... " *Id.* Among the factors to be taken into account on a Rule 4:50 motion are the "extent of the delay in making the application for relief, the underlying reason or cause, fault or blamelessness of the litigant, and any prejudice that would accrue to the other party." *IMO Guardianship of J.N.H.*, 172 N.J. 440, 474 (2002)

The record pretty clearly indicates that by

opinion and order dated June 6, 2005, this Court granted Defendant Borough of Avalon's ("Avalon") Motion for Summary Judgment finding that all of Plaintiffs' claims are time-barred pursuant to the six year statute of limitations set forth in N.J.S.A. 2A:14-1 and the two year statute of limitations set forth in N.J.S.A. 2A:14-2.

Plaintiffs contend that the Order on its face grants no affirmative relief to Avalon, but simply dismisses Plaintiffs' Complaint. As to Plaintiffs' Cross-Motion on Avalon's Counterclaims, this Court made no substantive ruling but only stated that "Plaintiffs' Cross-Motion are (sic) therefore denied." The crux of this Motion centers upon Plaintiffs' contention that the Final Judgment and Opinion did not affect title to Plaintiffs' real property.

Plaintiffs dispute that the Avalon acquired legal and recordable title to the property in question as a result of the granting of Summary Judgment. Specifically, Plaintiffs contend that this Court's finding that Avalon took physical possession of Plaintiffs' property in 1962 is, was not and cannot be a finding that such physical possession of property was tantamount to Avalon having acquired legal and recordable title to property.

Defendants contend that Plaintiffs are barred from making this application which Defendants contend is in complete disregard for the Judgment of this Court, the Judgment of the Appellate Division, res judicata, collateral estoppel, the law of the case and

the strong judicial and public policy interests in the finality of judgments.

As noted by Defendants this matter was brought before the Appellate Division. The Appellate Division specifically states that

> this appeal requires us to determine the applicable limitation period within which a private party must commence an action to challenge the taking of private property by a public entity, as an exercise of its police power, where the public entity's actions fail to comply with any of the statutory provisions governing the use of eminent domain.

Based upon this focus of the Appellate Division, Plaintiffs take the position that the Appellate Division did not consider the issue of who has legal and recordable title to the disputed property.

However, the decision is not limited to the statutory limitation and does in fact address issues of possession. In the second to last paragraph of the Appellate Division's opinion the Court states

> Here, the taking was complete when the Borough came upon the property; took exclusive possession of it; and through a series of municipal resolutions, appropriated, transformed, and built upon the property to accomplish its

> express public purpose: the restoration and protection of the shore line. All this was accomplished in 1965. Thus, there is no factual support for applying the "continuing wrong" doctrine to rescue plaintiffs from the legal consequences of their deliberate inactions.

This Court also acknowledges that Plaintiffs similarly presented the issues raised in this Motion to the Appellate Division. Specifically, Plaintiffs argued as follows:

> Avalon makes much of the fact that Plaintiffs, alleging improperly, have told this Court that Avalon recorded the order at issue on this appeal and treated that order as an order transferring title in the Property from the plaintiffs to Avalon. Avalon claims that informing this Court of what Avalon perceives to be the full legal effect of the ruling below (the transfer of title from an uncompensated private owner to a governmental entity) is "wholly improper."

The Appellate Decision in this case was published on April 30, 2007. This motion now almost one year later seeks to open the final judgment to clarify and for other relief. Consistent with Plaintiff's conduct throughout this litigation the delay of one year to seek relief is extraordinary especially when these same issues have been presented in the briefing in the

Appellate Court.

The decision of this Court as affirmed by the Appellate Court is that the Plaintiffs are barred from seeking just compensation based on the six year State of Limitations and the continuous emergency possession of the property by the Borough since 1962. While it is true that the title question was never argued, briefed or decided in the prior proceedings, it is the clear implication of that decision that title vested in the Borough of Avalon in April of 1971 upon the failure of the Plaintiff to seek just compensation.

Most likely the Borough should have brought an action for a Declaratory Judgment to clear title. Given the subsequent decisions of this Court, it is certain that clear title would have vested in the Borough at any time after the Statute of Limitations expired in April of 1971 and this Court now so declares. The Court further determines that the recording of the June 2005 Order and Opinion of this Court is proper to transfer title under the facts of this case.

Based on this holding in the Appellate Division this Court is satisfied that Avalon now owns the property and has title by way of the taking and that Plaintiffs' ownership interests are extinguished. This matter has already been properly adjudicated and, therefore, Plaintiffs' Motion is denied.

April 25, 2008
Joseph C. Visalli, J.S.C.

** NOTE: Text in the following three pages that appears in ***bold italics*** was handwritten. **

FREDERICK w. SCHMIDT, JR., LLC
106 North Main Street, Unit D
P.O. Box 120
Cape May Court House, NJ 08210-0120
(609) 465-2300 (609) 465-4061 (Fax)
ATTORNEY FOR PLAINTIFFS
HENRY E. RAAB AND CLARA V. MONTAGNA

CERTIFIED TO BE
A TRUE COPY

[DATE STAMP]
FILED APR 25 2008
Office of the Superior Court Clerk
By Deputy Clerk of the Superior Court
HOWARD H. BERCHTOLD, JR.
CAPE MAY COUNTY

HENRY E. RAAB and CLARA V. MONTAGNA,
Plaintiffs,

Vs.

BOROUGH OF AVALON,
Defendant and Third Party Plaintiff,

Vs.

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
Third Party Defendant

SUPERIOR COURT OF NEW JERSEY
CAPE MAY COUNTY
LAW DIVISION

DOCKET NO. CPM-L-257-02

CIVIL ACTION
Denial of Plaintiff's Motion for an
ORDER TO OPEN CASE, CLARIFY FINAL JUDGMENT AND ORDER AND EXPUNGE AND VACATE RECORDATION OF FINAL JUDGMENT AND OPINION IN CAPE MAY COUNTY CLERK'S RECORDS *& Declaratory Judgment validating the Recording of title.*

THIS MATTER having been opened to the Court by Frederick W. Schmidt, Jr., attorney for Plaintiffs and Michael Donohue, Esquire appearing for Defendant and Third Party Plaintiff, Borough of Avalon and Brian Weeks, Esquire, Deputy Attorney General, appearing for Third Party Defendant, State of New Jersey Department of Environmental Protection and good cause appearing; IT IS on this *25th* day of APRIL, 2008 ORDERED that: ***Plaintiff's Motion is denied in all respects,*** *

[Text redacted]

510 #133 be and hereby is expunged and vacated.

[Text redacted]

5. A certified to be true copy of this Order with

Exhibits A through D shall be recorded with Deeds in the Cape May County Clerk's Office forthwith.

/s/
J.S.C.

** A Declaratory Judgment is granted in favor of the Borough of Avalon for the property in Question and the Recordation of the Judgment of June 6, 2005 is found valid and vests titles in the Borough of Avalon.*

SUPREME COURT OF NEW JERSEY
C-12 September Term 2007
61,204

[DATE STAMP]
FILED SEP ~7 2007
/s/
CLERK

HENRY E. RAAB and
CLARA V. MONTAGNA,
Plaintiffs-Petitioners,

v.

BOROUGH OF AVALON,
Defendant/Third-Party
Plaintiff-Respondent,

v.

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
Third-Party Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6028-04 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to Rule 2:12-9.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 5th day of September, 2007.

/s/
CLERK OF THE SUPREME COURT

The foregoing is a true copy of
the original on file in my office.
/s/
CLERK OF THE SUPREME COURT
OF NEW JERSEY

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6028-04T5

APPROVED FOR PUBLICATION
April 30, 2007
APPELLATE DIVISION

HENRY E. RAAB and
CLARA V. MONTAGNA,

Plaintiffs-Appellants,

v.

BOROUGH OF AVALON,

Defendant/Third-Party
Plaintiff-Respondent,

v.

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,[1]

---

[1]The Borough's third-party complaint against the Department of Environmental Protection was dismissed by stipulation of the parties.

Third-Party Defendant-Respondent.

Argued December 20, 2006 – Decided April 30, 2007

Before Judges Cuff, Fuentes and Baxter.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-257-02.

Frederick W. Schmidt, Jr., argued the cause for appellants (Connell Foley, attorneys; Mr. Schmidt, of counsel; Marc D. Haefner and Tricia B. O'Reilly, of counsel and on the brief).

Michael J. Donohue argued the cause for respondent Borough of Avalon.

Lewin J. Weyl, Deputy Attorney General, argued the cause for respondent State of New Jersey, Department of Environmental Protection (Stuart Rabner, Attorney General, attorney; Patrick DeAlmeida, Assistant Attorney General, of counsel; Brian Weeks, Deputy Attorney General, on the brief).

The opinion of the court was delivered by FUENTES, J.A.D.

Plaintiffs, Henry E. Raab and Clara V.

Montagna, appeal from the summary judgment dismissal of their claims against defendant, Borough of Avalon ("the Borough"). Plaintiffs sought compensation for the physical taking of their property by the Borough, together with damages under 42 U.S.C.A. § 1983.

Plaintiffs' complaint concerned vacant oceanfront property that the parties stipulated is not capable of development, because it is situated directly between the Borough's dune line established in 1968, and the ocean high-water line. Plaintiffs contend that the trial court erred: (1) by failing to apply the doctrine of waiver to the Borough's statute of limitations defense; (2) granting summary judgment while discovery was still pending; (3) refusing to apply the limitation period for adverse possession of land to the facts of this case; and (4) by finding that plaintiffs' claim for imposition of an easement by necessity was time-barred. As an alternate theory of liability, plaintiffs also argued that the Borough's actions should be viewed as a continuous trespass, subject to judicial redress until such trespass ceases.

Thus, as framed by the parties, this appeal requires us to determine the applicable limitation period within which a private party must commence an action to challenge the taking of private property by a public entity, as an exercise of its police power, where the public entity's actions fail to comply with any of the statutory provisions governing the use of eminent domain. This precise question of law has not been directly addressed or reviewed in any published

opinion of the courts of this State.

To answer this question, we first define the nature of the governmental action involved. Applying the definition of inverse condemnation articulated by our Supreme Court in *Greenway Development Co. v. Borough of Paramus*, 163 N.J. 546, 553 (2000), we now hold that the physical taking of real property by a governmental agency, without compliance with the statutory safeguards established by the Legislature for the lawful exercise of the power of eminent domain, constitutes an act of inverse condemnation.

We further hold that a cause of action against a governmental defendant to recover the value of the real property that was taken by inverse condemnation is governed by the provisions of N.J.S.A. 2A:14-1 -2, and must be filed within six years from the date of accrual, which is defined as the date the landowner becomes aware or, through the exercise of reasonable diligence, should have become aware, that he or she had been deprived of all reasonably beneficial use of the property. *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 280 N.J. Super. 320, 325 (App. Div. 1995), *aff'd in part and rev'd in part on other grounds*, 144 N.J. 84 (1996); *Harisadan v. City of E. Orange*, 187 N.J. Super. 65, 68-69 (App. Div. 1982).

In this context, we affirm the trial court's grant of summary judgment in favor of the municipal defendant because plaintiffs' inverse condemnation action was filed more than six years beyond its accrual date. Consequently, we reject all of plaintiffs'

arguments, including those seeking to characterize the municipality's actions as a continuing trespass, otherwise subject to judicial redress until its cessation.

We will examine and discuss these issues in the following factual context.

I

This case concerns a piece of vacant beachfront property within the Borough of Avalon, situated at Block 76.03 (formerly Block 76C), and covering Lots 12, 14, 16, 18, 20, 64 and 107, as identified on the Borough's current tax map ("the property"). By the time this matter came before the trial court on May 13, 2005, the property no longer had direct access to 76th Street, and there was a forty-foot strip of land that was owned by the Borough and was located between the property and the end of 76th Street.

A sand dune also runs along the western edge of the strip, nearest to the street. Across the sand dune and the strip is a dirt walkway and boardwalk that the Borough uses as the public right-of-way from 76th Street, across the north end of the property, to the public beach. The walkway contained signs directing pedestrian traffic to the beach. It has existed for over forty years. The public beach surrounds the property on the east and south sides, and the ocean high-water line is east of the beach.

In August 1961, the Borough owned the property, which had direct access onto the dirt

roadway of 76th Street. By Resolution No. 7033, the Borough formally proclaimed that the property was not needed for public use, and sold it to Tri-Guy Holding Company, Inc. ("Tri-Guy"), a New Jersey corporation, owned by Thomas Tufaro, plaintiff Henry Raab, and George Montagna, husband of plaintiff Clara Montagna. Tri-Guy bought the property for one dollar plus the transfer to the Borough of two other beach front lots that it owned, and had once purchased from the Borough.

A

The Nor'easter

In March 1962, an Atlantic "Nor'easter" storm devastated much of the New Jersey coastline, including the Borough, which is situated on a barrier island. The storm obliterated the beach; washed the end of 76th street into the ocean; and transformed the property into a tidal area of oceanfront.

As a result, the Borough passed various ordinances to protect and rebuild the shoreline. Resolution No. 62-102, dated August 15, 1962, declared that it was in the Borough's "best interests... to restore the sand dunes, vegetation and other protections [that] existed along the shore line." In pursuit of this goal, the Resolution authorized the municipal officials and their representatives

> to enter immediately upon property to be used as protective barriers to take control

> and possession thereof, and to do such acts as may be required, including removing, destroying or otherwise disposing of any property located thereon without first paying any compensation therefor.

The resolution further provided

> that nothing in this resolution shall be construed to deny to any person who has interest in any property which has been possessed by the Borough of Avalon the right to obtain therefore just compensation to the extent that such property shall have been taken by the Borough. No compensation shall be granted to any individual to the extent that the action of the Borough of Avalon does not amount to a taking of property but to a reasonable regulation of property pursuant to a proper exercise of the police power.

Resolution No. 62-103, also dated August 15, 1962, authorized the Borough to use its emergency powers to dispense with the bidding process and to "immediately" construct "protective barriers in the form of Sand Dunes between 13th and 80th Streets."

Finally, Resolution No. 62-117, dated September 19, 1962, permitted the Borough's chief executive official to enter into an agreement to "acquire all

lands, easements, rights of way or other areas within the municipality if required in connection with" constructing the protective barrier and to "do such other acts as may be necessary to carry out the terms of the Agreement."

B

Compensation Efforts

In November 1962, the Borough instituted a property-exchange program as a means of compensating property owners whose lots had been taken as a result of the storm. Under this program, affected owner s could exchange their former lots for Borough-owned lots of equal or greater value, provided that the owner agreed to pay any difference in the value. Despite this tacit acknowledgment of a taking, the Borough still held property owners responsible for the taxes on their lots. This was made clear in letters sent to property owners after the storm.

As part of the shoring-up and rebuilding effort, the Borough also constructed a dune that ran the entire length of the municipality, along the storm-created ends of each street. Although there is no specific date as to when this dune was built, based on a letter from Tri-Guy to the Borough dated April 29, 1965, it appears that (1) the dune was already in place as of April 26, 1965, (2) Tri-Guy knew it could not build on the property, and (3) Tri-Guy wanted to participate in the Borough's land-exchange program. The April 29 letter read, in part:

Dear Sir:

This letter is in regard to our conversation of April 26, 1965, at your office. In 1961, we owned Block #9A, Lots 19-20 on 9th Street, ocean front (110 x 110). A storm came along and washed away a portion of it. The Borough of Avalon asked us to exchange these lots so that the Borough could erect a Bulk Head to prevent any further soil erosion of the island.

. . . .

In exchange we accepted [the property]. *On April 26, we visited the lots with the intention of building a home, and we found that the sand barrier [is] on the property in question and we cannot, therefore, build on those lots. We are now requesting that the Borough of Avalon exchange [the property] for* Block #68C1 Lots 1, 2, and 3, which have a comparable assessed value of $6,600, and is presently owned by the Borough of Avalon.

We understand that the Borough has a formula that they use in similar cases of this type. will you please give this your kindest attention.

[(Emphasis added.)]

By letter dated May 25, 1965, the Borough rejected Tri-Guy's proposed exchange because the lots Tri-Guy had chosen were "valued at more than three times the original assessed value of [the property]." In response, Tri-Guy wrote on June 25, 1965, proposing the exchange of three different lots. Although the record does not contain the Borough's specific response to this counter-proposal, we are satisfied that the parties failed to reach an agreement.

C

Manifestation of a Taking

In June 1968, the Borough adopted the "Beach Protection Ordinance," Ordinance No. 393, which expressly delineated the "dune line" and prohibited the removal or redistribution of sand on all lands east of the dune line, except for recreation and unless approved by the Borough Commissioners. The "dune line" was defined as "that certain line established by the Borough of Avalon... [, which] shall exist and be established regardless of whether or not actual sand dunes are situate thereon." The dune line was drawn such that the entire property was east of the line.[2]

---

[2]Ordinance No. 415, adopted in August, 1969, and Ordinance No. 442, adopted in October 1970, described the dune line as being east of the property.

In January 1969, Tri-Guy conveyed the property for $600 to its three principals: Tufaro, plaintiff Raab, and George Montagna. In September 1969, the Borough adopted Ordinance No. 416, which eliminated any right-of-way access through the property to 76th Street. Specifically, the ordinance declared that:

> The public right, title and interest in, along and upon that portion of the public street known as SEVENTY-SIXTH STREET in the Borough of Avalon, New Jersey,... is hereby vacated, surrendered and abandoned.
>
> [More particularly described as follows:]
>
> All that portion of SEVENTY-SIXTH STREET, 60 feet wide, from a point 445 feet Southeastwardly from the Southeasterly line of Dune Drive, Southeastwardly *to the high water line of the Atlantic Ocean.*
>
> [(Emphasis added.)]

In December 1971, the Borough adopted Ordinance No. 468, creating a beach fee program, requiring all those wishing to access the beach to pay a fee to travel from 76th Street to the property. In January 1979, the Borough adopted Ordinance No. 614, changing the zoning for the property from residential use to P-U (public use), prohibiting all permanent construction, except for limited

recreational use.

In June 1979, the Borough adopted Ordinance No. 628, prohibiting all construction on beaches and dunes, except for development that had no prudent or feasible alternatives and would not cause significant adverse long-term impact on the natural functioning of the beach or dune system. This ordinance was modified by three subsequent ordinances prohibiting construction on any parcel, public or private, east of the dune line unless approved by the Borough's Zoning Board of Adjustment.[3]

In November 1982, counsel for Tri-Guy's principals sent a letter to the Borough inquiring as to the status of the property. The copy of this letter included in plaintiffs' appendix is barely legible. Using the Borough's December 8, 1982, response as a reference, there is clear evidence to conclude that the principals were aware that the establishment of the dune line effectively prevented any development on the property. Specifically, the Borough's response noted that: "The Borough Clerk's Office is still researching the files in order that I can answer your question as to whether any consideration was paid by the Borough to the lot owners whose lots were rendered unbuildable [sic] by the adoption of the Dune Line." By letter dated July 21, 1983, the Borough formally advised the

---

[3] *See* Ordinance No. 202-86, adopted in August 1986; Ordinance No. 216-87, adopted in January 1987; and Ordinance No. 236-87 in October 1987.

principals that it was "not interested in purchasing" the property.

In the summer of 1994, the Borough received funds from the State Department of Environmental Protection ("DEP") to restore and replenish the beach area. The Borough's agreement with the State required private property owners who wanted to build in the erosion hazard area, which included the property at issue here, to first submit their plan to the DEP for review and approval.

In June 1997, Tri-Guy's principals or their estates "sold" the property to plaintiffs for $70. In a letter to the Borough dated March 16, 2001, plaintiffs declared their intention "to sell" the property "to any willing purchaser or [to] the Borough for a fair market price that assumes the lot can be used for the construction of a single family residence." In the event the Borough was not interested in purchasing the property, plaintiffs requested that the property be "rezone[d]... to permit construction of a single family residence, which is compatible with the existing neighborhood, and [to] move the dune line to the east side of the [property]." If this proposal was rejected, plaintiffs indicated that. they would "sue the Borough for 'inverse condemnation.'" On April 26, 2002, plaintiffs filed their complaint.

II

In his memorandum of opinion, Judge Visalli concluded that plaintiffs' claims were time-barred. The

Judge found that, as successor in title to the original owners, plaintiffs were bound by the content of the letter dated April 29, 1965, which demonstrated a clear awareness that the Borough "had entered their property and constructed a dune thereon, thus effectively 'taking' their property." Relying on our holdings in *Harisadan* and *Russo Farms*, Judge Visalli held that plaintiffs' cause of action filed in 2002 was barred by the six-year statute of limitations in N.J.S.A. 2A:14-1, because their claims accrued as of April 29, 1965. Specifically, Judge Visalli noted that:

> Plaintiffs do not dispute the content of the letter dated April 29, 1965. Nor do plaintiffs present any evidence that disputes same. Accordingly, the Court finds that as of at least April 29, 1965, plaintiffs had knowledge that Avalon entered their property and took control via the dune's construction, thus effectuating a taking. Upon discovering Avalon's action, plaintiffs had the burden to take the appropriate action to seek compensation timely.

We agree with Judge visalli's analysis and ultimate conclusion, and therefore affirm.

In *United States v. Clarke*, 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980), the Supreme Court reviewed the propriety of governmental condemnation of private property, through the physical occupation of such property, without the benefit of legal process. In

this context, the Court discussed the analytical differences between "condemnation" and "inverse condemnation."

> The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. As defined by one land use planning expert, "[inverse] condemnation is *'a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' A landowner is entitled to bring such an action as a result of "the self-executing character of the constitutional provision with respect to compensation. A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase 'inverse condemnation,' as a common understanding of that phrase would suggest, simply describes an action that is the "inverse" or "reverse" of a condemnation proceeding.
>
> There are also important practical

> differences between condemnation proceedings and actions by landowners to recover compensation for 'inverse condemnation.' Condemnation proceedings, depending on the applicable statute, require various affirmative action on the part of the condemning authority. To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. *Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation.*

[*Id.* at 257, 100 S. Ct. at 1130, 63 L. Ed. 2d at 377 (internal citations omitted) (emphasis added).]

In New Jersey, our Supreme Court has reviewed the question of inverse condemnation in the context of excessive use of the state's police power in the form of overreaching regulatory schemes that operate effectively to deprive the private property owner "of all, or substantially all of the beneficial use of the totality of his property." *Greenway Dev. Co., supra*, 163 N.J. at 553 (quoting *Pinkowski v. Tp. of Montclair*, 299 N.J. Super. 557, 575 (App. Div. 1997)). We have also recognized that an unconstitutional taking occurs when the state physically occupies private property for public use. *Pinkowski, supra*, 299 N.J. Super. at 575.

Applying these principles to the facts developed before the trial court, there is no question that the

Borough's actions in physically appropriating plaintiffs' property constituted a "taking." Further, because such taking was accomplished without the benefit of judicial process, as envisioned by the Legislature when it adopted N.J.S.A. 20:1-36,[4] it is viewed as an inverse condemnation, shifting the burden to the aggrieved landowner "to discover the encroachment and to take affirmative action to recover just compensation." *Clarke, supra*, 445 U.S. at 257, 100 S. Ct. at 1130, 63 L. Ed. 2d at 378.

In this light, we agree with Judge Visalli that the letter dated April 29, 1965, clearly shows that plaintiffs' predecessors in title were aware that a physical taking of their property had occurred, entitling them to compensation. The following passage illustrates the point.

> On April 26, we visited the lots with the intention of building a home, and we found that the sand barrier in [sic] on the property in question and we cannot, therefore, build on those lots. We are now requesting that the Borough of Avalon exchange [the property] for Block #68C1 Lots 1, 2, and 3, which have a comparable assessed value of $6,600, and is presently owned by the Borough of Avalon.

---

[4]The statute cited was the one in existence in 1962. It was repealed by L. 1971, c. 361, § 49.

Thus, plaintiffs' cause of action for inverse condemnation accrued on or about April 26, 1965.

With respect to the time period within which a cause of action for inverse condemnation must be brought, it is now well-settled that the six-year period in N.J.S.A. 2A:14-1 constitutes the relevant standard. In *Russo Farms*, we reviewed a claim of inverse condemnation in relation to flooding on the plaintiffs' farmland. *Russo Farms, supra*, 280 N.J. Super. at 325. Relying on *Harisadan* and *Morey v. Essex County*, 94 N.J.L. 427, 430 (E. & A. 1920), we held that those claims were subject to the six-year statute of limitations in N.J.S.A. 2A:14-1. *Russo Farms. supra*, 280 N.J. Super. at 325.

In contrast to the facts here, the inverse condemnation claims in *Russo Farms* "continued to accrue" as long as the defendant's conduct caused the property to be subject to continual flooding. *Id.* at 327. Thus, because flooding continued to occur within the six years preceding the complaint, the claims were not time-barred. *Ibid.* We reached a similar conclusion in *Harisadan.*

In *Harisadan*, the property at issue was situated within a region declared blighted and targeted for redevelopment. *Harisadan, supra*, 187 N.J. Super. at 66-67. The property remained "under a constant threat of condemnation for ten years," causing a deterioration of value, vacancies, and lost income to both the owner and the major tenant. *Id.* at 67. Applying N.J.S.A. 2A:14-1, we held that "[u]ntil the municipal action

causing the injury is withdrawn or the project abandoned, the undue infringement upon the use of property continues." *Id.* at 68-69. We found that "[t]he continuing failure or refusal to condemn" the property had caused the property to remain under the threat of condemnation, so the plaintiffs' cause of action did not "accrue" at the point of the initial blight declaration, and the statute of limitations had not run. *Id.* at 70.

Morey is the oldest case espousing the notion of "continuing violation" as a means of extending the limitations period. In *Morey*, the plaintiffs' property fronted on a county road. *Morey, supra*, 94 N.J.L. at 427. At some point in 1912, the county straightened a curve in the road, taking possession of and filling a portion of the plaintiffs' property to use for the roadway without providing compensation. *Id.* at 428. The county defended its actions solely by claiming that the six-year statute of limitations had run. *Ibid.* The case went to a jury, and the trial court charged that the statute of limitations was no bar to recovery because the trespass was a continuous one. *Id.* at 428-29. On appeal from a verdict in the plaintiffs' favor, the Court of Errors and Appeals affirmed, holding:

> The right of action of the plaintiffs does not rest entirely upon the original tortious entry and *partial destruction of their property*, but upon the continued occupation and use of the property by the defendant following the original entry. The plaintiffs were entitled to sue as soon as the primary tortious act was

> committed, and would have been entitled to recover damages up to the time of the institution of the suit... In other words, the constant repetition of the defendant's unlawful acts, its persistence in its wrongful occupation of plaintiffs' land, constituted a continuous trespass...

[*Id.* at 430 (emphasis added).]

Thus, the Court in *Morey* held that the plaintiffs were entitled to recover damages for the six-year period preceding the complaint, and it expressed no opinion on whether damages could be recovered for any earlier period, as that issue had not been raised in the appeal. *Ibid.*

Finally, in *287 Corporate Center Associates. v. Township of Bridgewater,* 101 F.3d 320 (3d Cir. 1996), acknowledging that neither 42 U.S.C.A. § 1983, nor the Fifth Amendment include a statute of limitations provision, the court reaffirmed the principle that, in such situations, "we must look to the most 'appropriate' or 'analogous' state statute of limitations." *Id.* at 323 (quoting *Wilson v. Garcia*, 471 U.S. 261, 268, 105 S. Ct. 1938, 1942, 85 L. Ed. 2d 254, 261 (1985)). After reviewing the relevant New Jersey cases, including *Russo Farms* and *Harisadan*, the Third Circuit concluded that the plaintiff's claim for inverse condemnation was barred by the six-year limitation period in N.J.S.A. 2A:14-1. In so doing, the court specifically rejected the plaintiff's "continuing violation" argument, noting that "the Township has

not committed an affirmative act since... the alleged taking stabilized almost ten years before Associates filed its lawsuit." *Id.* at 324.

Here, the taking was complete when the Borough came upon the property; took exclusive possession of it; and through a series of municipal resolutions, appropriated, transformed, and built upon the property to accomplish its express public purpose: the restoration and protection of the shore line. All this was accomplished in 1965. Thus, there is no factual support for applying the "continuing wrong" doctrine to rescue plaintiffs from the legal consequences of their deliberate inactions.

By way of summary, the record developed before the trial court indisputably established that, as of April 1965, (1) plaintiffs' predecessor in title was aware that the Borough had exercised control and dominion over the property, effectively depriving it of all or reasonably all of the property's beneficial use; (2) the Borough's actions constituted an inverse condemnation, because they were carried out without compliance with any of the statutory provisions governing the exercise of eminent domain; and (3) these title holders did not initiate any legal challenge to this de facto taking until well beyond the six-year statute of limitations applicable to inverse condemnations. Given these facts, plaintiffs' claims are barred.

Affirmed.

I hereby certify that the foregoing is a
true copy of the original on file in my office
/s/
CLERK OF THE APPELLATE DIVISION

RECORDATION OF JUDGMENT AFFECTING TITLE TO REAL PROPERTY IN ACCORDANCE WITH N.J.S.A. 46:16-1.1 WITH REGARD TO BLOCK 76C; LOTS 12, 14, 16, 18, 20, 64 AND 107 IN THE BOROUGH OF AVALON, COUNTY OF CAPE MAY, STATE OF NEW JERSEY

WHEREAS, the New Jersey Superior Court, Law Division, ruled on June 6, 2005, by way of an Order for Summary Judgment, a Certified True and Correct copy of which is attached hereto as Exhibit "A", in accordance with the written opinion of the Court attached here to as Exhibit "B", that the Borough of Avalon effectuated a taking of Lots 12, 14, 16, 18, 20, 64 and 107 in Block 76C in the Borough of Avalon on or about August 15, 1962; and

WHEREAS, such Judgment of the Superior Court affects the title to such property in as much as the taking in 1962 vested the Borough of Avalon with title and removed title from the then-record-owners; and

WHEREAS, NJ.S.A. 46:16-1.1 requires that any Judgment which affects title to real property should be recorded and indexed in the names of the parties to the cause set forth in the Judgment, to wit: *Henry E. Raab and Clara V. Montagna v. Borough of Avalon*, CPM-L-257-02.

NOW, THEREFORE, the Borough of Avalon in the County of Cape May, State of New Jersey, by and through it attorney, Michael J. Donohue, Esquire, in

accordance with and under the authority of N.J.S.A. 46:16-1.1, does hereby submit the attached opinion of the Court and Certified True and Correct Order of Summary Judgment for Recording in the Office of the Clerk of Cape May County.

Based upon the above and in accordance with NJ.S.A. 46:16-1.1, the record of title for the following property should reflect that title with the Borough of Avalon, New Jersey:

PROPERTY AFFECTED BY JUDGMENT

Lot(s) 12, 14, 16, 18, 20, 64 and 107 in Block76C as delineated on the official Tax Map of the Borough of Avalon in the County of Cape May, State of New Jersey.

BEING THE SAME PREMISES taken by the Borough of Avalon on August 15, 1962, by way of Resolution 62-102 and Resolution 62-103, on file in the office of the Avalon Borough Clerk.

BEING THE SAME PREMISES conveyed by Deed by the Borough of Avalon to Tri-Guy Holding Company, Inc., dated August 25, 1961. And recorded in Deed Book 1062, Page 5, in the Office of the Cape May County Clerk.

Dated: July 18, 2005

/s/
Michael J. Donohue
Attorney for the
Borough of Avalon

EXHIBIT A

Michael J. Donohue, Esquire
9629 Third Avenue
Unit #5-Suite 201A
Stone Harbor, NJ 08247
(609) 368-7350
Attorney for DEFENDANT/
THIRD PARTY PLAINTIFF
BOROUGH OF AVALON

[Date Stamp
June 06, 2005
Office of the Superior
by Deputy Clerk of
the Superior Court
CHARLES E.
MCCAFFERY
Cape May County]

Henry E. Raab and Clara V. Montagna
Plaintiff(s)

vs.

Borough of Avalon
Defendant/
Third Party
Plaintiffs

vs.

New Jersey Department of Environmental Protection,
Third Party
Defendant.

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
CAPE MAY

COUNTY

DOCKET NO. CPM-L-257-02

CIVIL ACTION

ORDER

This matter having been opened to the Court by way of the motion for summary judgment in accordance with R4:46, of the Defendant Borough of Avalon,

based on application of statutes of limitations and the doctrine of laches, and the Court having held oral argument on the motion on the return date and Michael J. Donohue, Esquire appearing for the Defendant /Third Party Plaintiff, Borough of Avalon, and Frederick W. Schmidt, Jr., Esquire, appearing on behalf of Plaintiffs, and Brian Weeks, Deputy Attorney General appearing on behalf of Third Party Defendant Department of Environmental Protection; the Court having considered all submissions provided by the parties and for good cause shown, it is on this 6th day of June, 2005, hereby

ORDERED, as follows:

1. That the claims of Plaintiffs alleging, *inter alia*, against the Borough of Avalon, inverse condemnation; taking without just compensation and seeking an easement by necessity, appearing as Counts One, Two, Three and Four of the complaint, arising under New Jersey state law and/or the Constitution of the United States, accrued as of August 15, 1962; are subject to the six-year limitations period of N.J.S.A. 2A:14-1; are accordingly, time based and are hereby DISMISSED WITH PREJUDICE.
2. That the claims of Plaintiff alleging violation on the part of the Borough of Avalon of U.S.C.A 42 §1983 appearing at Count Five. are subject to the two-year limitations period of N.J.S.A. 2A:14-2; are, accordingly, time barred and are hereby DISMISSED WITH PREJUDICE.*

*Plaintiffs' Cross Motions are therefore denied.

EXHIBIT B

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS
[DATE-STAMP JUN 06 2005
Office of the Superior Court Clerk
by Deputy Clerk of the Superior Court
CHARLES E. MCCAFFERY
Cape May County]

TO: Michael J. Donohue, Esquire
9629 Third Avenue
Unit #5-Suite 201A
Stone Harbor, NJ 08247

Frederick W. Schmidt, Jr., Esquire
106 North Main Street
P.O. Box 120
Cape May Court House, NJ 08210

CASE: Henry E. Raab et al v Borough of Avalon
DOCKET: CPM L 257-02

NATURE
OF APPLICATIONSummary Judgment

MEMORANDUM OF DECISION ON MOTION
PURSUANT TO RULE 1:6-2(F)

Having carefully reviewed the moving papers

and any response filed, I have ruled on the above motion as follows:

Plaintiffs are the successors to the interests of a New Jersey Corporation known as Tri-Guy Holdings Company, Inc. ("Tri-Guy"). Tri-Guy obtained title to lots 12, 14, 16, 18, 20, 64 and 107 in Block 76C in the Borough of Avalon from the Borough of Avalon ("defendant") by Deed dated August 25, 1961. At that time, the subject property was an area of dune on the southerly side of 76th Street, which was then a dirt road extending through the dune area and terminating at the sand area of the beach. In March of 1962, the subject property was devastated by a severe storm. Subsequent to the storm, the dune, all vegetation and any sign that 76th Street had traversed the area of property was completely removed.

On August 15, 1962, defendant passed a resolution that permitted it to construct a protective barrier "from 13th Street to 80th Street" which included the area of the property in question. On March 16, 2001, plaintiffs sent defendant correspondence seeking relief from defendant's currently existing Ordinance affecting the subject property. Relief was denied. Subsequently, plaintiffs filed a Complaint alleging inverse condemnation, taking without just compensation and seeking an easement by necessity. Plaintiffs also allege a violation of U.S.C.A. 42 §1983. Now before the Court is defendant's motion for summary judgment and plaintiffs' cross-motion for summary judgment.

N.J.S.A. 2A:14-1 provides that an action "for trespass to real property, for any tortuous injury to real or personal property, for taking ... personal property, ... for any tortuous injury to the rights of another not stated in sections 2A:14-2 [personal injury] and 2A:14-3 [libel or slander]..." must be commenced within six years "after the cause of any such action shall have accrued. "This six year statute of limitations applies to actions alleging an inverse condemnation, *Harisadan v. City of East Orange*, 187 N.J. Super 65, 68-69 (App. Div. 1982); *Russo Farms. Inc. v. Vineland Bd. of Educ.*, 280 N.J. Super. 320 (App. Div. 1995) (applying six year statute of imitations to inverse condemnation action) *aff'd in part and reve'd in part*, 144 N.J. 84 (1996)(issue not raised on appeal).

The record before the Court reveals that on August 15, 1962, Avalon adopted Resolution 62-102 ("the Resolution"). The Resolution permitted Avalon to enter and take control of land where necessary to construct a protective barrier. The Resolution provides in part, "...the proper officials, agencies and /or representatives of the Borough of Avalon be and are hereby authorized to enter immediately upon property to be used as protective barriers to take control and possession thereof, and to do such acts as may be required, including removing, destroying or otherwise disposing of any property located thereon without first paying any compensation therefore. "Resolution No. 62-102 (Aug. 15, 1962)

Some time after the Resolution was adopted,

Avalon created a dune that encompasses plaintiffs' property. The record does not clearly establish the actual date the dune was created. It is clear, however, that as of April 29, 1965, plaintiffs were aware that Avalon had entered their property and constructed a dune thereon, thus effectively "taking" their property. When it is alleged that a governmental body had effectuated a taking without recourse to eminent domain proceedings, 'such a taking ... shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation.'" *287 Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320, 323 (3rd Cir., N.J. 1996) (quoting *United States v. Clark*, 445 U.S. 253, 257 (1980). Plaintiffs discovered Avalon's actions no later than April 29, 1965. Accordingly, plaintiffs had the burden "to take affirmative action to recover just compensation .... within the time specified by the appropriate statue of limitations." *Id.* Applying the six-year statute to these undisputed facts leads the Court to conclude that plaintiff's claim was time barred as of April 29, 1971.

The Court does not find that the passage of Ordinance No. 202-86, adopted by Avalon on August 14, 1986, amended by Ordinance No. 216-87, adopted January 29, 1987, and further amended by Ordinance No. 236-87 saves plaintiffs' Complaint because any claim that plaintiff may have had became time barred as of April 29, 1971. Plaintiffs do not dispute the content of the letter dated April 29, 1965. Nor do plaintiffs present any evidence that

disputes same. Accordingly, the Court finds that as of at least April 29, 1965, plaintiffs had knowledge that Avalon entered their property and took control via the dune's construction; thus effectuating a taking. Upon discovering Avalon's action, plaintiffs had the burden to take the appropriate action to seek compensation timely. Id.

Plaintiffs failed to take appropriate action within the six-year statute of limitations as required by N.J.S.A. 2A:14-1. For the reasons noted above, plaintiff also failed to timely bring its U.S.C. §1983 action. Accordingly, defendants' motion is granted.

June 6, 2005
Joseph C. Visalli, J.S.C.

STATE OF NEW JERSEY
Bk D3173 Ps520 133
RECORDED COUNTY OF CAPE MAY
Rita Marie Fulginiti, Acting Clerk
Recording Fee 140.00
Date 07-18-2005 09:09a

[COURT SEAL]

COUNTY OF CAPE MAY,

I, Charles E. McCaffery, Deputy Clerk of the Superior Court in the State of New Jersey, and for the County of Cape May, DO HEREBY CERTIFY, that the foregoing is a true and correct copy of ORDER FOR SUMMARY JUDGMENT FILED JUNE 6, 2005 IN THE MATTER OF CPM-L-277-02 HENRY E. RAAB & CLARA V. MONTAGNA VS. BOROUGH OF AVALON VS. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

as filed and recorded, in the office of The Deputy Clerk.of Superior Court of the County of Cape May.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, which is the seal of said Court, at Cape May Court House, this seventh day of July Two thousand five

/s/ Arlette Anderson, Acting Deputy
for CHARLES E. MCCAFFERY
DEPUTY CLERK OF THE SUPERIOR
COURT

[SEAL

SUPREME COURT OF NEW JERSEY
M-201 September Term 2010
064721

[DATE STAMP]
FILED
OCT 07 2010
/s/
CLERK

HENRY E. RAAB AND
CLARA V. MONTAGNA,
PLAINTIFFS-MOVANTS,

V.

BOROUGH OF AVALON, ETC.,
DEFENDANT-THIRD PARTY
PLAINTIFF-RESPONDENT,

V.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
THIRD PARTY DEFENDANT-
RESPONDENT.

O R D E R

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is

denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 5th day of October, 2010.

/s/
CLERK OF THE SUPREME COURT

The foregoing is a true copy
of the original on file in my office.
/s/
CLERK OF THE SUPREME COURT
OF NEW JERSEY

TOLLING AGREEMENT

THIS TOLLING AGREEMENT is entered into on this 9th day of March, 2006 between the Borough of Avalon ("Avalon") and Henry E. Raab and Clara V. Montagna ("Raab and Montagna") (hereafter collectively referred to as "the Parties").

WHEREAS, Raab and Montagna have an appeal pending before the Appellate Division of the New Jersey Superior Court entitled Henry E. Raab and Clara V. Montagna v. Borough of Avalon v. New Jersey Department of Environmental Protection, Docket Number A-6028-04TS (hereinafter the "*Raab Litigation*"); and

WHEREAS, on July 18, 2005 Avalon recorded the Law Division's Order and Opinion dated June 6, 2005 with the Cape May County Clerk as a Deed, purportedly pursuant to N.J.S.A. 46:16-1.1 (hereinafter "the July 18, 2005 Recordation"); and

WHEREAS, on October 27, 2005, Raab and Montagna, through counsel, served notices of claims under the New Jersey Tort Claims Act allegedly based upon and arising out of the July 18, 2005 Recordation; and

WHEREAS, Avalon and Raab and Montagna acknowledge that there are or may be disputes and claims between them related to and arising out of the July 18, 2005 Recordation; and

WHEREAS, the Parties desire to toll any claims arising out of or related to the July 18, 2005 Recordation during the pendency of the *Raab Litigation*;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereto, intending to be legally bound, agree as follows:

1. For purposes of this agreement, the term "Claim" shall be defined as any claim or potential claim brought by Raab and Montagna against Avalon arising out of or related to the July 18, 2005 Recordation.

2. Avalon agrees that the time period beginning on the date of entry of this Tolling Agreement through either (I) the date seventy-five (75) days after any judgment or settlement of the *Raab litigation* becomes final and unappealable (the "Relevant Period"), or (ii) the Termination Date as specified below, will not be included in computing the running of the time under the applicable statutes of limitation or by way of laches, estoppel or other defense of delay in the event Raab and Montagna assert a Claim, as defined herein, against Avalon. This Tolling Agreement shall have no impact on the running of time outside the Relevant Period.

3. Except as specifically set forth in Paragraph 2, this Tolling Agreement shall not

prejudice any defense that Avalon may assert, plead or raise in response to Claims, as defined herein, including but not limited to defenses based on statutes of limitations or by way of laches, estoppel or other defense of delay or other time bars provided the Relevant Period is not included in determining the validity of such defenses.

4. Raab and Montagna hereby agree to forbear from filing any suit or legal action with regard to any Claim as defined herein until the earlier of the expiration of the Relevant Period (whether by adjudication, settlement, or dismissal) or the effective date of the termination of this Tolling Agreement pursuant to Paragraph 6.

5. Avalon agrees not to convey, transfer title, or take any other action in any way further affecting the ownership and use of the property that is the subjection of the July 18, 2005 Recordation during the Relevant Period.

6. Raab and Montagna or Avalon may terminate this Tolling Agreement by giving thirty (30) days written notice by certified mail to the other party Avalon. Notice shall be effective if provided to the Parties as follows:

To Avalon:

Andrew J. Bednarek, Administrator
Borough of Avalon
3100 Dune Drive

Avalon, NJ 08202

and

Michael J. Donohue, Esq.
Unit #5, Suite 200
9629 Third Avenue
Stone Harbor, NJ 08247

To Raab and Montagna:

Frederick W. Schmit, Jr., Esq.
106 North Main Street; Unit D
Cape May Courthouse, NJ 08210

and

Tricia B. O'Reilly, Esq.
Connell Foley LLP
85 Livingston Avenue
Roseland, New Jersey 07068

Notice of termination shall be effective upon the date of proper mailing and termination shall be effective thirty (30) days after such notice.

7. Neither Party hereto shall employ this Tolling Agreement for any purpose whatsoever other than to enforce the terms of this Tolling Agreement.

8. This Tolling Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors, representatives and

assigns.

9. This Tolling Agreement sets forth the entire understanding of the Parties with respect to the subject matter hereof. This Tolling Agreement shall not be binding on any Party hereto until it has been executed by all Parties hereto.

10. The undersigned representatives of the Parties each certifies that he is fully authorized to enter into the terms and conditions of this agreement and to legally bind such party to this document.

11. This Tolling Agreement may be signed in counterparts, and each counterpart shall be deemed an original.

Signed this 13 day of March, 2006 for and on behalf of Henry E. Raab and Clara V. Montagna:

/s/_____
Tricia B. O'Reilly
Connell Foley LLP
85 Livingston Avenue
Roseland, New Jersey 07068

Signed this 9th day of March 2006 for and on behalf of Borough of Avalon

/s/_____

Michael J. Donohue
Unit #5, Suite 200
9629 Third Avenue
Stone Harbor, NJ 08247

Michael J. Donohue, Esquire
9629 Third Avenue
Unit #5 – Suite 201A
Stone Harbor, NJ 08247
(609) 368-7350
Attorney for DEFENDANT/
THIRD PARTY PLAINTIFF,
BOROUGH OF AVALON

Henry E. Raab and Clara V. Montagna,
Plaintiff(s)

vs.

Borough of Avalon
Defendant/
Third Party Plaintiffs

vs.

New Jersey Department of
Environmental Protection,
Third Party Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

DOCKET NO. CPM-L-257-02

CIVIL ACTION

FIRST AMENDED ANSWER
WITH COUNTERCLAIMS

OF DEFENDANT/THIRD PARTY
PLAINTIFF, BOROUGH OF AVALON

Defendant, Borough of Avalon, a municipal corporation of the State of New Jersey, by way of FIRST AMENDED ANSWER to the Complaint of the Plaintiffs says:

1. (a) Defendant does not have sufficient knowledge or information to either admit or deny the allegations of this paragraph and Plaintiffs are left to their proof thereof

1. (b) Admitted.

2. DENIED. Plaintiffs have forfeited title to the property to the Borough of Avalon as a matter of law.

3. Defendant does not have sufficient knowledge of information to either admit or deny the allegations as to the identity or status of the parties or stockholders and Plaintiff is left to their proof thereof. The balance of the allegations of this paragraph are DENIED inasmuch as the referenced documents speak for themselves.

4. Admitted.

5. Admitted.

6. Defendant does not have sufficient knowledge or information to either admit or deny the allegations of this paragraph and Plaintiffs are left to their proof thereof.

7. The conveyance is admitted and the balance of the allegations of this paragraph are denied.

8. Admitted that a street vacation ordinance was adopted. The ordinance speaks for itself. The balance of the allegation is DENIED inasmuch as the Borough has obtained title to the land in question by operation of law.

9. Admitted that a walkway exists and that is has existed for over forty years. Denied that this is Plaintiffs' property since Plaintiffs have lost title as a matter of law.

10. Admitted that Avalon has continuously, openly, notoriously and adversely possessed Plaintiff's property for over forty years.

11. The allegations of this paragraph are neither admitted nor denied as the Ordinance, and any amendment thereof, speaks for itself. Admitted that Plaintiffs never took any action to oppose the passage of any ordinance related to the zoning of this area or the placement of the dune line and took no action for nearly forty years. The time to challenge the enactments has long passed and the Plaintiffs have lost title to these lands as a matter of law.

12. The allegations of this paragraph are neither admitted nor denied as the Ordinance, and any amendment thereof, speaks for itself. Plaintiffs took no action for nearly twenty years to challenge any of these enactments and the time to challenge same has long passed.

13. The allegations of this paragraph are neither admitted nor denied as the Ordinance, and any amendment thereof, speaks for itself

14. The allegations of this paragraph are neither admitted nor denied as the Ordinance, and any amendment thereof, speaks for itself. Plaintiffs took no action for over twenty years to challenge any of these enactments and the time to challenge same has long passed.

15. The execution of the State Aid Agreement is admitted but the balance of the allegations of this paragraph are neither admitted or denied as the Agreement and any amendment thereof speaks for itself.

16. The execution of the State Aid Agreement is admitted but the balance of the allegations of this paragraph are neither admitted or denied as the Agreement and any amendment thereof speaks for itself

17. The execution of the State Aid Agreement is admitted but the balance of the allegations of this paragraph are neither admitted or

denied as the Agreement and any amendment thereof speaks for itself.

18. Denied.

19. Denied that at taking has occurred. The Borough has maintained open, adverse and notorious possession of these lands for more than forty years without any objection on the part of Plaintiffs and has thus gained title to said lands as a matter of law.

20. Denied.

COUNT ONE

21. Defendant hereby repeats the answers made to the foregoing allegations and incorporates the same herein by reference.

22. Denied that at taking has occurred. The Borough has maintained open, adverse and notorious possession of these lands for more than forty years without any objection on the part of Plaintiffs and has thus gained title to said lands as a matter of law.

23. Denied that at taking has occurred. The Borough has maintained open, adverse and notorious possession of these lands for more than forty years without any objection on the part of Plaintiffs and has thus gained title to said lands as a matter of law.

COUNT TWO

24. Defendant hereby repeats the answers made to the foregoing allegations and incorporates the same herein by reference.

25. Denied that at taking has occurred. The Borough has maintained open, adverse and notorious possession of these lands for more than forty years without any objection on the part of Plaintiffs and has thus gained title to said lands as a matter of law.

COUNT THREE

26. Defendant hereby repeats the answers made to the foregoing allegations and incorporates the same herein by reference.

27. Denied that at taking has occurred. The Borough has maintained open, adverse and notorious possession of these lands for more than forty years without any objection on the part of Plaintiffs and has thus gained title to said lands as a matter of law.

28. Denied that at taking has occurred. The Borough has maintained open, adverse and notorious possession of these lands for more than forty years without any objection on the part of Plaintiffs and has thus gained title to said lands as a matter of law.

COUNT FOUR

29. Defendant hereby repeats the answers made to the foregoing allegations and incorporates the same herein by reference.

30. Denied.

31. Denied.

32. Denied. There are no implied rights inasmuch as Plaintiffs have forfeited title to these lands as a matter of law.

33. Denied. See number 32.

34. Denied. See number 32.

COUNT FIVE

35. Defendant hereby repeats the answers made to the foregoing allegations and incorporates the same herein by reference.

36. Denied that at taking has occurred. The Borough has maintained open, adverse and notorious possession of these lands for more than forty years without any objection on the part of Plaintiffs and has thus gained title to said lands as a matter of law.

37. Denied that at taking has occurred. The Borough has maintained open, adverse and notorious possession of these lands for more than forty years without any objection on the part of Plaintiffs and has thus gained title to said lands as a matter of law.

WHEREFORE, Defendant demands judgment in its favor any against the Plaintiffs dismissing the Complaint together with costs of suit.

SEPARATE DEFENSES

1. The Complaint fails to state a cause of action.

2. The Complaint fails to state a claim upon which relief can be granted.

3. The Complaint must be dismissed by reason of the failure of the Plaintiffs to pursue and exhaust administrative remedies.

4. The Plaintiffs are not entitled to relief because of the equitable principle of laches.

5. The Plaintiffs are not entitled to relief because of the equitable principle of waiver.

6. The Plaintiffs are not entitled to relief because of the equitable principle of estoppel.

7. The Complaint has been filed beyond the applicable Statute of Limitations and therefore must be dismissed.

8. Plaintiffs property is located in an area which has rendered it unbuildable by one or more laws of the State of New Jersey and/or regulations of one or more Administrative Agencies of the State of New Jersey including, but not limited to, the New Jersey Department of Environmental Protection.

9. Plaintiffs' property is located

exclusively in an area defined by the State of New Jersey as a beach dune or beach dune area and any development is regulated by the State of New Jersey and this Defendant has no control or right of control over the State.

10. Plaintiffs have failed to join a necessary and indispensable party or parties without whom relief cannot be granted.

11. Any development on Plaintiffs' property is subject to State control and regulation and the entire issue of any development on this property has been preempted by the State of New Jersey.

12. Significant portions of Plaintiffs' property is located in a public street bed and therefore the property does not qualify for the issuance of a development permit.

13. Plaintiffs' property does not qualify for a development permit by reason of the provisions of the New Jersey Municipal Land Use Law.

14. For in excess of 40 years the Borough of Avalon has been in notorious, actual, adverse, exclusive, continuous, and uninterrupted possession of the property in question and the Defendant Borough of Avalon claims title by operation of law under N.J.S.A. 2A:14-30 [redacted material]. Said use and possession by the Defendant has been by and on behalf of the general public has been notorious, actual, adverse, exclusive, continuous, and

uninterrupted possession and without objection or interference by the plaintiffs for over forty years.

15. The Plaintiffs' claims are barred by N.J.S.A. 2A:14-6, which requires a claim to title of real property be made within 20 years of accrual of such claim The Borough of Avalon has maintained notorious, actual, adverse, exclusive, continuous, and uninterrupted possession for over forty years and since at least 1962, at which time the Borough proceeded to construct a dune in the area of Plaintiffs' property with no objection being heard from the Plaintiff for forty years.

16. The Plaintiffs' claims are barred by N.J.S.A. 2A:14-7, which requires such an action to be brought within 20 years. The Borough of Avalon has maintained notorious, actual, adverse, exclusive, continuous, and uninterrupted possession for over forty years.

17. Plaintiff has failed to exhaust all required administrative procedures and remedies available with regard to permits required to be obtained from the state of New Jersey, the United states, and/or the Borough of Avalon with respect to development of this property. Accordingly, the Court is without jurisdiction in this matter.

18. The "Public Trust Doctrine" creates an easement in favor of the public due to the avulsion of public sand from other areas of the beach effectuated by the Borough of Avalon after the "March storm" of

1962. The area in question became a tidal area in the wake of the storm. The Borough endeavored over the next forty years to harvest sand from other areas of the public beach and place it on the area in question to create a dune system for the prevention of flooding and protection of property. Accordingly, the area in question is now part of the public trust and the public, by and through the Borough, has obtained an easement over the area for the purposes of a dune.

WHEREFORE, Defendant, Borough of Avalon, respectfully demands JUDGMENT against Plaintiffs as follows:

a. For dismissal of the Complaint in all counts;

b. For title to the Parcel;

c. For extinguishment of any and all claims to title on the part of Plaintiffs;

d. Alternatively for a prescriptive or public trust easement for maintenance of a dune;

e. For attorneys fees and costs of suit;

f. For any other relief which the court may deem equitable, fair, just and/or in the public interest.

COUNTERCLAIMS

By way of COUNTERCLAIMS against Plaintiffs, the Borough of Avalon says the following:

BACKGROUND FACTS ON COUNTERCLAIMS

2. On or about August 25, 1961, Plaintiffs, operating as Tri-Guys Holdings Company, Inc., purchased from the Borough of Avalon, Lots 12, 14, 16, 18, 20, 107 and 64 in Block 76, (hereinafter "the Parcel") in the Borough of Avalon, such conveyance being recorded Deed Book 1062, page 5, in the Office of the Clerk of Cape May County.

3. The conveyance referenced at paragraph 1 herein above was specifically made pursuant to Resolution 7033 of the Borough of Avalon, adopted August 23, 1961, a copy of which is appended hereto as Exhibit "1".

4. [Redacted material]

5. On or about March 5, 1962, an intense storm commonly known as "the March Storm" or the "Ash Wednesday Storm" (hereinafter "the March Storm "), struck the New Jersey Coast, including the Borough of Avalon, and caused extensive damage including severe coastal erosion.

6. Prior to the March Storm, 76th Street in the Borough of Avalon continued on an

Easterly track from Dune Drive to what was the beach area, and was an improved, dirt road which abutted the Parcel. See Exhibit "2", attached.

7. As a result of the March Storm, the portion of 76th street consisting of an improved, dirt road, abutting the Parcel was completely obliterated by the storm and in fact became a tidal area of oceanfront beach. See Exhibit "3", attached.

8. As a result of the March Storm, the Parcel, which had been comprised prior to the storm of a vegetated dune area, was completely obliterated and in fact became a tidal area of oceanfront beach. See Exhibits "2" and "3".

9. Immediately after the March Storm on or about March 5, 1962, and continuing through the present, the Borough of Avalon engaged in a course of conduct designed to establish a permanent dune area for the protection of property within the Borough and the prevention of flooding.

10. Plaintiffs, by way of allegations in their complaint, admit that the course of conduct referenced at paragraph #8 above included the Parcel area and

consisted of actions on the part of the Borough including but not limited to the following:

a. clean up of the Parcel area in the wake of the March Storm;

b. harvesting and moving sand from other areas of the beach to the Parcel area in order to recreate the dune that had been obliterated by the March Storm;

c. Planting the Parcel area with appropriate vegetation in order to control erosion of the recreated dune in the Parcel area;

d. Continuous monitoring and occasional sand renourishment and vegetation re-planting of the dune in the Parcel area;

e. Construction and maintenance of public access consisting of a beach path improved by placement of road gravel. fencing and staircase structures over the Parcel area;

f. Continuous maintenance of the Parcel area through removal of litter and wheather and tide

related debris;

g. Rezoning of the Parcel area to create a conservation zone for the express purpose of prohibiting construction in an effort to prevent property damage and flooding into improved areas of the Borough;

h. Designation of a "dune line" west of the Parcel area in an effort to contain the Parcel area in the dune constructed by the Borough after the March Storm from development or destruction in order to prevent property damage and flooding in improved areas of the Borough.

I. Vacation of 76th Street which abutted the Parcel area but was merely a "paper street" after the March Storm, in an effort to ensure that the dune created by the Borough, including the Parcel area, was not developed or destroyed in order to protect improved areas of the Borough from flood damage.

j. Constructed and maintained dune fencing in order to grown

the dune in the Parcel area.

k. _____

11. The Borough began the course of conduct referenced in paragraph 9 above, on or about March 5, 1962, and continues to the present to engage in the conduct referenced in the interest of preserving the dune area for flood protection.

12. The Borough's presence upon the Parcel area has been open and continuous; notorious, hostile and adverse to the interests of Plaintiffs since on or about March 8, 1962, through the present, by virtue of the fact, among other things, that the Borough has on numerous occasions, filled the area with sand, planted and maintained vegetation, constructed and maintained a beach path, restricted access to the Parcel area by signage and fencing and removed litter and other debris from the Parcel area.

13. Plaintiffs admit by way of allegation in their complaint that the Borough vacated a portion of 76th Street in September 1969, which left the Parcel without access to a public street.

14. Plaintiffs took no action for over thirty years in an effort to object to the landlocking of the Parcel as a result of the vacation of a portion of 76th Street.

15. Plaintiffs admit by way of allegation in their complaint that since September 1969, there has been a public beach access walkway consisting of, a boardwalk and dirt path, created and maintained by the Borough of Avalon, which is upon and crosses the Parcel.

16. Plaintiffs did nothing in September 1969, and took no action for over thirty years, to object to the Borough's maintenance of this beach access across their property.

17. Plaintiffs admit by way of allegation in their complaint, that on or about June 5, 1968, the Borough of Avalon created a dune line west of the Parcel which had the effect of prohibiting any construction upon the Parcel.

18. Plaintiffs made no objection in June, 1968, when the dune line was created, to its location or the consequences of the creation of the dune line, and took no action to object to the location of the dune line for over thirty years after its creation.

19. Plaintiffs admit by way of allegation in their complaint, that in January, 1987, the Avalon zoning Ordinance was amended to include a provision which made construction upon the Parcel unlawful without relief from the Avalon Zoning Board of Adjustment.

20. Plaintiffs took no action in 1987 to object to the change to the Zoning Ordinance referenced in paragraph 18 above, and took no action for nearly fifteen years to object to the rezoning of the Parcel area.

21. Plaintiffs admit by way of allegation in their complaint that at least as early as 1979 and perhaps earlier, the Borough of Avalon included the Parcel in a zoning district which prohibited construction of residential structures.

22. Plaintiffs took no action in 1979 to object to the the Zoning Ordinance prohibiting residential construction on the Parcel, and took no action for over twenty years to object to such zoning of the Parcel area.

23. The zoning of the Parcel area was done with notice to the public by way of statutorily required advertisement in newspapers circulating in the Borough.

Additionally, enactment of and amendment of the zoning ordinance was subjected to public hearing and notice of the date and time of the public hearing was duly published in accordance with law.

24. Plaintiffs did not oppose the zoning enactment or changes applicable to the Parcel area at the time of enactment and never, until the filing of the current action, at least twenty years later, took any step to challenge the zoning enactments or changes.

25. The vacation of the portion of 76th Street which formerly abutted Plaintiffs property was done in accordance with law with notice to the public, including Plaintiffs.

26. Plaintiff took no action for over thirty years in an effort to object to the vacation of the portion of 76th Street referenced in paragraph number 24.

COUNTERCLAIM FOR POSSESSION OF AND TITLE TO THE PARCEL IN ACCORDANCE WITH N.J.S.A. 2A:14-30

27. Defendant/Counterclaimant Borough of Avalon, hereby repeats the allegations contained in paragraphs number 1

through 25 of the "background allegations" above as if same were set forth here at length.

28. By virtue of the fact that the Borough of Avalon has maintained notorious, actual, adverse, exclusive, continuous, and uninterrupted possession of the Parcel for over forty years, the Borough has gained title to the Parcel by operation of law pursuant to N.J.S.A. 2A:14-30.

WHEREFORE, Defendant, Borough of Avalon, respectfully demands JUDGMENT against Plaintiffs as follows:

a. For title to the Parcel;

b. For extinguishment of any and all claims to title on the part of Plaintiffs;

c. For attorneys fees and costs of suit;

d. For any other relief which the Court may deem equitable, fair, just and/or in the public interest.

COUNTERCLAIM FOR PRESCRIPTIVE EASEMENT IN THE PUBLIC INTEREST

29. Defendant/Counterclaimant Borough of Avalon, hereby repeats the allegations contained in paragraphs number 1 through 25 of the "background allegations" above as if same were set forth here at length.

30. By virtue of the fact that the Borough of Avalon has maintained notorious, actual, adverse, exclusive, continuous, and uninterrupted possession of the Parcel for over forty years in an effort to serve the public interest in flood prevention and property protection, with no objection from Plaintiffs, the public, by and through the Borough, have obtained a prescriptive easement by way of adverse possession of same for over forty years.

WHEREFORE, Defendant, Borough of Avalon, respectfully demands JUDGMENT against Plaintiffs as follows:

a. For an easement by prescription for the benefit of the public to maintain the Parcel area as it has been for over forty years, as a dune for the protection of property and the prevention of flooding;

b. For extinguishment of any and

all claims to title on the part of Plaintiffs;

c. For attorneys fees and costs of suit;

d. For any other relief which the Court may deem equitable, fair, just and/or in the public interest.

COUNTERCLAIM FOR CONSTRUCTION OF AN EASEMENT UNDER THE "PUBLIC TRUST" DOCTRINE

31. Immediately following the March Storm, the Parcel area was a tidal area, subject to the ebb and flow of the Atlantic Ocean.

32. At no time since March of 1962 have plaintiffs taken any action to fill the Parcel area to remove it from tidal flow.

33. Commencing in March 1962 and continuing through the present, the Borough of Avalon has, by avulsion, created a dune in the Parcel area by harvesting public sands from other areas of the beachfront that are part of the "Public Trust" and transporting those sands to the parcel area.

34. At no point in time from 1962 to the

present did Plaintiffs raise any objection to the avulsion occurring on the Parcel area.

35. At least twice, once following the March Storm and once in the mid 1990's, the Borough completely tilled the Parcel area with sands harvested from the Public Trust areas of the Avalon beach front.

36. Periodically over the course of the past forty years, the Borough of Avalon has harvested sand from other "Public Trust" areas of the beachfront and has transported those sands to the Parcel area to supplement by avulsion the dune in the Parcel, area for the protection of property and the prevention of flooding.

37. The public, by and through the Borough of Avalon, are entitled to a "Public Trust" easement over the parcel area for the maintenance of a dune system inasmuch as, but for the avulsion effectuated by the Borough of Avalon over the course of the past forty-plus years the Parcel area would be subject to regular tidal forces.

WHEREFORE, Defendant, Borough of Avalon, respectfully demands JUDGMENT against Plaintiffs

as follows:

a. For an easement under the "Public Trust" doctrine for the benefit of the public to maintain the Parcel area as it has been for over forty years, as a dune for the protection of property and the prevention of flooding;

b. For extinguishment of any and all claims to title on the part of Plaintiffs;

c. For attorneys fees and costs of suit;

d. For any other relief which the Court may deem equitable, fair, just and/or in the public interest.

Respectfully submitted,

Dated: 12/__ /04

_____

Michael J. Donohue
Attorney for Borough
of Avalon

CERTIFICATION IN ACCORDANCE WITH R. 4-6

I hereby certify that a copy of this Answer with Counterclaims was timely filed and served in accordance the Rules of Court on the below listed

Counsel for parties and/or parties. I understand that if this statement is willfully false, I am subject to punishment.

Frederick W. Schmidt, Esquire
106 North Main Street
P.O. Box 120
Cape May Court House, NJ 08210

Brian Weeks, DAG
Office of the Attorney General
Dept. of Law and Public Safety - Division of Law
25 Market Street
PO Box 093
Trenton, NJ 08625-0093

Dated: 12/__ /04

Michael J. Donohue
Attorney for Borough
of Avalon

DESIGNATION OF TRIAL COUNSEL

Pursuant to the Rules of Court, Michael J. Donohue, Esquire, of the Law offices of Michael J. Donohue, Attorney at Law, is hereby designated as Trial Counsel in this matter.

Dated: 12/__ /04

Michael J. Donohue
Attorney for Borough
of Avalon

CERTIFICATION PURSUANT TO R. 4:5-1

The undersigned hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey in good standing;

2. The matter in controversy herein is not the subject of any other action pending in any Court or any pending arbitration proceeding, nor is any other action or arbitration contemplated by my client;

3. **There is an action in the New Jersey Superior Court, Law Division, Cape May County, bearing docket number CPM-L-651-04, and encaptioned *Klumpp v. Borough of Avalon*, which involves similar facts and circumstances.

4. At this time, there are no other parties who should be joined in this action.

**It appears this matter was assigned to Judge Perskie by Judge Armstrong on or about November 22, 2004.

I hereby certify that the foregoing statements made by me are true. I understand that if any of these statements are willfully false I am subject to punishment.

Dated: 12/__ /04

Michael J. Donohue
Attorney for Borough
of Avalon

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FREDERICK W. SCHMIDT
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Counsel for Plaintiffs
Henry E. Raab and Clara V. Montagna

[DATE STAMP]
APR 26 2002

HENRY E. RAAB and
CLARA V. MONTAGNA,

Plaintiffs,

-vs-

BOROUGH OF AVALON,
a municipal corporation
of the State of New Jersey,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CAPE MAY COUNTY
DOCKET NO. CPML-25702

Civil Action

COMPLAINT AND JURY DEMAND

Plaintiffs Henry E. Raab and Clara V. Montagna (collectively referred to as the "Plaintiffs"), by way of Complaint against the Borough of Avalon, allege as follows:

1. (a) Plaintiffs are residents of the State of New Jersey with the following addresses: Henry E. Raab, 83 Municipal Drive, Mount Holly, New Jersey; Clara V. Montagna, 91 Gatehouse Lane, Edison, New Jersey.

(b) Defendant, Borough of Avalon, (hereinafter referred to as "Defendant" or "Avalon") is a Municipal Corporation in Cape May County, New Jersey.

2. Plaintiffs own property within the Borough of Avalon, situated at Block 76.03 (formerly Block 76C), Lots 12, 14, 16, 18, 20, 64 and 107, as identified on the Borough's tax map (the "Property"). The Property is located at the easterly end of 76th Street within the Borough. (A true and correct copy of a portion of the Defendants' tax map depicting the Property is attached hereto as Exhibit A.)

3. Tri-Guy Holding Company, Inc., a New Jersey Corporation ("Tri-Guy"); consisting of three stockholders: Thomas Tufaro; Plaintiff, Henry E. Rabb; and George A. Montagna, deceased husband of

Plaintiff Clara V. Montagna; acquired Block 9A, Lots 19 and 20 from Avalon by Deed dated October, 1958 and recorded in the Cape May County Clerk's Office on October 22, 1958 in Deed Book 974 at Page 290 for the sum of $4,500; pursuant to Resolution No. 6568 adopted August 19, 1958 and Resolution No. 6571 adopted September 10, 1958, which authorized the sale. (True and correct copy of the aforementioned Deed is attached as Exhibit B.) The conveyance included the following condition:

> "Requirements on the above lots. . . No more than one building for living purposes may be erected on not less than 5,000 square feet and the first floor must contain at least 900 square feet. No building may be over two stories in height."

This clearly confirms that Avalon sold this property for the purpose of development and Tri-Guy bought this property with the intent to develop the lot.

4. On November 12, 1959, Tri-Guy purchased several other lots for $8,310 from Avalon by Deed (recorded in the Cape May County Clerk's Office on December 16, 1959 in Deed Book 1008 at page 209) for the purpose of development. (A true and correct copy of the Deed is attached as Exhibit C.) This Deed contained the same development requirements limiting development of the lots to one residential dwelling with no more than two stories, and a first floor of not less than 900 square feet. By

this Deed, Avalon required Tri-Guy to actually construct a single family residence, which they did within the required time.

5. By way of Resolution No. 7033, dated August 23, 1961, and Deed dated August 25, 1961, and recorded at Deed Book 1062, page 5 in the Cape May County Clerk's Office, Avalon conveyed the Property in question described in paragraph 2 above to Tri-Guy. (A true and correct copy of this Deed is attached as Exhibit D).

6. Tri-Guy paid for the acquisition of the Property described in paragraph 5 above by conveying Block 9A, Lots 19 and 20 to Avalon, the same property Tri-Guy acquired from Avalon in 1958 (see Exhibit B and paragraph 3) by Deed dated September 18, 1961, and recorded in Deed Book 1054, page 511 in the Cape May County Clerk's Office, in exchange for the Property in question; described in paragraph 2 above. (A true and correct copy of the Deed is attached as Exhibit E.)

7. On January 31, 1969, Tri-Guy conveyed the Property in question to its three stockholders, Henry E. Raab, George Montagna and Thomas Tufaro, by Deed dated January 31, 1969 and recorded in the Cape May County Clerk's Office on May 1, 1969 at Deed Book 1210, page 445 (a true copy of this Deed is attached as Exhibit F). Following the death of George A. Montagna, Henry E. Raab, Thomas Tufaro and Clara V. Montagna, as Executrix for the Estate of George Montagna,

conveyed the Property to Henry E. Raab and Clara V. Montagna, by deed Dated June 14, 1997, recorded July 19, 1997 in Deed Book 2719, page 356. (A true and correct copy of the Deed is attached as Exhibit G.) At all times Raab and Montagna and their predecessors intended and reasonably expected to develop the Property.

8. There presently exists a strip of land (the "Borough Parcel") 40 feet wide at the end of 76th Street owned by the Borough and located between the dune line and the westernmost boundary of Plaintiffs' Property (see Exhibit A). The Borough adopted a street vacation Ordinance Number 416 on September 17, 1969; wherein pursuant to Section 51, the end of the 76th Street right of way in front of Plaintiffs' Property was vacated. This vacation of the right-of-way deprived Plaintiffs' Property of any and all vehicular and pedestrian access by public right of way and leaving Plaintiffs' Property land locked by Avalon's Beach. (A true and copy of Vacation Ordinance No. 416 is attached as Exhibit H.) Thus, Plaintiffs' Property can only be accessed by crossing Borough owned beach land, and the shortest distance is across the above referenced 40 feet strip of Defendant's public beach from 76th Street.

9. Since vacation of the 76th Street right of way street end, there presently exists a dirt walkway and boardwalk across the northern end of the Property, which constitutes a public right-of-way from 76th Street eastward to the beach area (the "Walkway"). The Walkway is used by members of

the public to gain access to the public beach area from 76th Street and Defendant's signs direct pedestrian traffic onto the Walkway and Boardwalk across the Plaintiffs' Property.

10. Upon information and belief, the Walkway was constructed by Avalon.

11. On June 5, 1968, Avalon adopted Ordinance No. 393, which limited development on the beach area by creating a dune line and prohibiting the removal or redistribution of sand on all land east of the dune line. The dune line created by Ordinance No. 393 was drawn such that the entirety of Plaintiffs' Property was east of the dune line. Pursuant to Avalon's Ordinance No. 415 adopted in August of 1969, the dune line was described to be west of Plaintiffs' Property and remains so today, pursuant to Ordinance No. 442 adopted October 7, 1970.

12. Pursuant to Ordinance No. 202-86, adopted on August 14, 1986, amended by Ordinance No. 216-87, adopted January 29, 1987 and further amended by Ordinance No. 236-87 adopted on September 10, 1987 (currently codified as 7.9.2c.), construction on Plaintiffs' Property east of the dune line is prohibited unless approved by the Borough's Zoning Board of Adjustment. Such an application may be approved only where the Applicant "demonstrates by clear and convincing evidence that the application will not cause significantly adverse long term impacts on the natural functioning of the

beach and dunes systems, either individually or in combination with other existing proposed structures, land disturbances or activities."

13. By Ordinance No. 469 adopted December 15, 1971 or possibly by an earlier Ordinance, Avalon created a beach fee program requiring the payment of admission to the beach area from 10:00 AM to 5:00 PM daily from early June through the first weekend after Labor Day, thereby requiring Plaintiffs to pay Avalon in order to access Plaintiffs' Property. Codified Ordinance No. 7-3.12 also requires a separate permit in order to cross the public beach in a vehicle in order to access Plaintiffs' Property. However, the permit may only be used from September 15th of each year to May 15th of the following year. The applicable Ordinances provide for fines up to $500.00 or imprisonment for up to 90 days or both for a violation.

14. Pursuant to Ordinance No. 614 adopted January 30, 1979, (or by ordinance adopted earlier), the zoning for the Property was changed from residential use to P-U (Public Use). The P-U Zone prohibits all permanent construction other than *public buildings* (including schools, libraries, museums and art galleries), and limits use to a public beach thereby prohibiting residential use of the Property and any other viable uses as well.

15. On or about July 13, 1994, Avalon entered into a State Aid Agreement ("Agreement")

with the New Jersey Department of Environmental Protection and Energy (hereinafter "DEP") by which the DEP approved and funded 75% of a beach restoration and replenishment project for Avalon (a true and correct copy of the Agreement is attached as Exhibit I), which has been successfully implemented.

16. In this Agreement, Avalon agreed to the following among others:

a) Retain Ordinance Nos. 216-87 and 236-87, amending Ordinance No. 202-86, Chapter VII, Article 2, which prohibits Plaintiffs from removing, distributing or redistributing sand for construction of any structure without a permit issued only "if the Applicant demonstrates by clear and convincing evidence that the Application will not cause significantly adverse long term impacts on the natural functioning of the beach and dunes systems ...";

b) submit all construction applications and site plans to the DEP, Bureau of Coastal Regulation for comment pursuant to the Rules on Coastal Zone Management (N.J.A.C. 7:7E) and "shall follow the Bureau's comments ....";

c) make no change to Ordinance Nos. 216-87 or 236-87 without DEP prior approval; and

d) prohibit development on Beaches, Dunes, and Erosion High Hazard areas, which includes Plaintiffs' Property.

17. Pursuant to the terms of the State Aid Agreement, if Avalon fails to comply with the Agreement, it shall repay the State's 75% share of the beach restoration and replenishment costs. Under the Agreement, Avalon is also responsible for compensation to any private property owner as a result of enforcement of the policies set forth in the Agreement.

18. At all times since August 1961, Plaintiffs and/or their predecessors in title have paid to the Borough of Avalon all taxes assessed on the value of the Property.

19. The Borough, by (I) creating a Beach Dune area that includes Plaintiffs' Property and prohibits construction thereon; (ii) vacating the right of way end of 76th Street and depriving Plaintiffs public access to their Property; (iii) changing the zoning from residential to P-U thereby prohibiting residential use and all other viable economic use of the Property; (iv) adopting the beach fee ordinance, which charges Plaintiffs for and limits pedestrian and vehicular access to Plaintiffs' Property; (v) constructing a public walkway and boardwalk across the Northern end of Plaintiffs' Property in order to provide the public beach access for a fee; (vi) surrounding Plaintiffs' Property by public beach; (vii) entering into State Aid Agreements with the New Jersey Department of Environmental Protection by which Avalon is required to prohibit Plaintiffs' use of their Property for construction of a single family residence and all other viable economic use of the Property; and

(viii) swapping Plaintiffs' buildable lot for the Property in question; has taken and continues to take Plaintiffs' Property for use by the public as a public beach and for public beach access purposes both through physical possession and confiscatory regulation of the subject Property.

20. By letter dated March 16, 2001, Plaintiffs advised Avalon of the ownership history of the Property. In that same letter, Plaintiffs requested, among other things, that Avalon rezone the Property and permit construction of a single family residence which is compatible with the existing neighborhood, and move the dune line to the east side of the property. The lots to the north and south of the Property are developed with residential structures. To date Plaintiffs' request for relief has not been granted.

COUNT ONE

(Physical Taking of a Portion of the Property Comprising the Area Occupied by the Walkway and Boardwalk in violation of the United States Constitution and the New Jersey Constitution)

21. Plaintiffs repeat the foregoing allegations as if set forth at length herein.

22. By having constructed and continuously using the Walkway and boardwalk across the Property for public beach access and vacating the 76th street end and depriving the property of vehicular access Avalon has and continues to physically invade and

take the portion of the Property occupied by the Walkway and boardwalk, without just compensation for a public use.

23. As a result of this physical taking of the portion of the Property comprising the area occupied by the Walkway and boardwalk, the remainder of the Property has suffered a diminution in value.

WHEREFORE, the Plaintiffs seek the following relief:

A. Judgment finding that the Defendant, Borough of Avalon, has perpetrated a physical taking of a portion of the Property in violation of the Fifth Amendment to the United States Constitution and Article I, ¶20 of the New Jersey Constitution;

B. An Order appointing Commissioners to establish just compensation for the taking;

C. Judgment awarding plaintiffs just compensation, including compound interest and counsel fees, expert witness fees and expenses and costs of suit; and

D. Any and all relief the Court deems appropriate and just.

COUNT TWO
(Physical Taking of the Entirety of the Property In Violation of the United States Constitution and New Jersey Constitution)

24. Plaintiffs repeat the foregoing allegations as if set forth at length herein.

25. By (1) having constructed, mandated and authorized the continuous use the Walkway and Boardwalk across the Property for public beach access; (2) vacating the end of 76th street, thereby depriving the Property of vehicular access; (3) surrounding the property with public beach and incorporating Plaintiffs' property into the public beach area; and (4) creating a beach fee program which incorporates Plaintiffs' Property in the beach area subject to the beach fee requirement, Avalon has and continues to physically invade and take the entirety of the Property without just compensation for a public purpose.

WHEREFORE, the Plaintiffs seek the following relief:

A. Judgment finding that the Defendant, Borough of Avalon, has perpetrated a physical taking of the entirety of the Property in violation of the Fifth Amendment to the United States Constitution and Article I, ¶20 of the New Jersey Constitution;

B. An Order appointing Commissioners to establish just compensation for the taking;

C. Judgment awarding plaintiffs just compensation, including compound interest and counsel fees, expert witness fees and expenses and costs of suit; and

D. Any and all relief the Court deems appropriate and just.

COUNT THREE
(Inverse Condemnation)

26. Plaintiffs repeat the foregoing allegations as if set forth at length herein.

27. The inclusion the Property within the Public Use Zone; the prohibition of all construction east of the dune line; the incorporation of Plaintiffs' Property into the beach fee program; the entering into the State Aid Agreement with NJDEP; the vacating of the right of way end of 76th Street; and failure to provide any relief to Plaintiffs in response to their March 16, 2001 letter, individually and together have denied Plaintiffs their reasonable investment-backed expectations, have destroyed the economic value of the Property, and have permanently deprived Plaintiffs of all viable economic use of their Property.

28. In prohibiting any economically viable development of the Property, the Borough of Avalon has violated the Fifth Amendment to the United States Constitution and Article I, ¶20 of the New Jersey Constitution by taking the Property for public use without just compensation.

WHEREFORE, Plaintiffs demand judgment as follows:

A. Judgment declaring that the actions of

the Defendant, Borough of Avalon, have taken the Property without payment of just compensation in violation of Plaintiffs' rights under the Fifth Amendment to the United States Constitution and under Article I, ¶20 of the New Jersey Constitution;

B. An Order appointing Commissioners to establish just compensation for the taking;

C. Judgment Awarding Plaintiffs just compensation, including compound interest and counsel fees, expert witness fees and expenses and costs of suit; and

D. . Any and all relief the Court deems appropriate and just.

COUNT FOUR
(Easement by Necessity)

29. Plaintiffs repeat the foregoing allegations as if set forth at length herein.

30. At the time the Borough conveyed the Property to Plaintiffs, both the Borough and the Plaintiffs intended that the Plaintiffs would have a right of pedestrian and vehicular access from 76th Street to the Property.

31. There currently exists no vehicular access or private right-of-way from 76th Street to the Property. The only area of access from 76th Street to the Property is occupied by the public pedestrian right-of-way

easement, which crosses the Borough Parcel and the Property to the beach area.

32. There exists an implied private right of access to the Property from 76th Street.

33. This implied right of access can exist only across the Borough Parcel.

34. The full beneficial use and enjoyment of the Property cannot be realized in the absence of a pedestrian and vehicular right-of-access over the public property between the dune line and the Property.

WHEREFORE, Plaintiffs demand judgment as follows:

A. Judgment granting to Plaintiffs an easement by necessity providing private access to the Property from 76th Street across lands currently owned by the Borough of Avalon; and

B. Any and all relief the Court deems appropriate and just.

COUNT V
(VIOLATION OF 42 U.S.C. §1983)

35. Plaintiffs repeat the foregoing allegations as if set forth at length herein.

36. As a direct and proximate result of the

acts and omissions of Avalon as herein described, Plaintiffs have been deprived of their Property without due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. Specifically, the physical and regulatory restrictions imposed upon Plaintiff's Property as set forth in detail above and the failure to provide plaintiffs any relief therefrom have destroyed the value of Plaintiff's Property to such an extent that such restrictions amount to a taking by eminent domain without due process of law.

37. As a direct and proximate result of the acts and omissions of the Avalon herein described, Plaintiffs have been deprived of their Property without due process and equal protection in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. Specifically, the aforesaid actions of the Avalon, which have resulted in unreasonable restraints on the Plaintiffs' Property and in the physical occupation of Plaintiffs' Property by Avalon, are arbitrary and capricious; do not substantially advance legitimate governmental interests; and, therefore, constitute an excessive restriction of the use of private property in violation of 42 U.S.C. §1983 and the due process and equal protection guarantees of the Fourteenth Amendment of the United States Constitution.

WHEREFORE, Plaintiffs demands judgment as follows:

A. Declaring that the actions of Avalon toward

Plaintiffs, their predecessors and their Property constitute a taking of private property without due process of law in violation of 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution;

B. Declaring the actions of Avalon toward Plaintiffs, their predecessors and their Property are arbitrary and capricious and an invalid exercise of Avalon's police power;

C. Awarding plaintiff's just compensation, including compound interest and counsel fees, expert witness fees and expenses and costs of suit and consequential damages and

D. granting such other relief as may be just and appropriate under the circumstances.

JURY DEMAND

Plaintiffs hereby demands trial by jury as to all issues.

DESIGNATION OF TRIAL ATTORNEY

Tricia B. O'Reilly and Frederick W. Schmidt, Jr. are hereby designated trial counsel for plaintiffs Henry E. Raab and Clara V. Montagna.

CONNELL FOLEY LLP
Co-Counsel for Plaintiffs
Henry E. Raab and Clara V. Montagna

By: /s/
Tricia B. O'Reilly

FREDERICK W. SCHMIDT, JR.
Co-Counsel for Plaintiffs
Henry E. Raab and Clara V. Montagna
By: /s/
Frederick W. Schmidt, Jr.

DATED:

CERTIFICATION PURSUANT TO RULE 4:5-1(b)(2)

The undersigned hereby certifies that the matter in controversy herein is not the subject of any other action pending in any court or of a pending arbitration proceeding, and that no other action or arbitration proceeding is contemplated.

/s/_____
Frederick W. Schmidt

DATED:

EXHIBIT A

[AVALON TAX MAP GRAPHIC OMITTED]

EXHIBIT B

BOOK 974 PAGE 290

This Indenture, Made This day of October in the year of our Lord one thousand nine hundred and fifty-eight (1958).

Between THE BOROUGH OF AVALON, a Municipal Corporation of the State of New Jersey, party of the first part, and TRI-GUY HOLDING, INC., a corporation of the State of New Jersey, 140 Durham Avenue, Metuchen, New Jersey, party of the second part.

Witnesseth, That the party of the first part, for and in consideration of the sum of FORTY FIVE HUNDRED DOLLARS ($4500.) lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the [illegible] and delivery of these premises, the receipt whereof is hereby acknowledged, has granted, bargained, sold, [illegible], released, conveyed and conformed, and by these presents does grant bargain, sell, [illegible] , release, convey and conform, unto the party of the second part, its successors heirs and assigns, ALL THOSE CERTAIN lots tracts, or parcels of land situate in the Borough of Avalon, County of Cape May and State of New Jersey.

Being Lots 19 and 20 in Block 9-A (110' x 110').

Requirements on the above lots...No more than one

building for living purposes may be erected on not less than 5000 square feet and the first floor area must contain at least 900 square feet. No building may be over two stories in height.

Together with all and singular, the buildings, improvements, woods, [illegible], rights, liberties, privileges, [illegible], and appurtenances, to this [illegible] belonging or in any way appertaining, and the reversion and reversions, remainder and remainders, rents, [illegible], and the profits thereof, and of every part and parcel whereof; And Also, all of the estate, right, title, interest, property, possession, [illegible] and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances.

To Have and to Hold the said premises, with all and singular the appurtenances, unto the said party of the second part, its successors, heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors, heirs and assigns forever.

In Witness Whereof, the said party of the first part has caused these presents to the signed bu its Mayor and attested by its Borough Clerk and the official seal of the said Borough to be affixed hereto pursuant to Resolutions No. 6568 and No. 6571 duly adopted on August 19, 1958 and September 10, 1958 respectively, authorizing the sale of the within lands and the execution of the within conveyance.

THE BOROUGH OF AVALON

[SEAL] /s/_____
Edith M. Greenan, Mayor

STATE OF NEW JERSEY)
COUNTY OF CAPE MAY) ss:

Be it Remembered, that on the [illegible] day of October in the year of our Lord one thousand nine hundred and fifty-eight be me, a Notary Public of New Jersey, personally appeared Barbara Quinn who being by me duly sworn, on her oath [illegible] that he is the Borough Clerk of the Borough of Avalon the grantor within named, and that Edith W. Greenan is the Mayor; that deponent knows the [illegible] or corporate seal of said grantor and that the seal annexed to the within Deed or Conveyance is such [illegible] or corporate seal; that the said Deed or Conveyance was signed by the said President and the seal of said grantor affixed thereto in the presence of deponent; that said Deed or Conveyance was signed, sealed and delivered as and for the voluntary act and deed of said grantor for the uses and purposes therein expressed, pursuant to a Resolution of the Board of Commissioners of said grantor; and at the execution thereof this deponent subscribed his name thereto as witness.

Sworn and Subscribed
the day and year aforesaid
[NOTARY SEAL]

/s/_____
Barbara Quinn

Deed

THE BOROUGH OF AVALON, a Municipal Corporation of the State of New Jersey,
to
TRI-GUY HOLDING CO., INC. a New Jersey Corporation, 140 Durham Avenue, Metuchen, New Jersey,

Dated, October 1958

Recorded in the Clerk's Office of the County of Cape May on the 22nd day of October, A.D. 1958 at 12:30 o'clock in the afternoon, and recorded in the Book of Deeds for said County as pages

/s/ _____

EXHIBIT C

Twelfth day of November in the year of our Lord one thousand nine hundred and fifty-nine

Between BOROUGH OF AVALON, IN THE COUNTY OF CAPE MAY, a municipal corporation of N.J., party of the first part, and TRI-GUY HOLDING CO., 140 Durham Ave., Metuchen, N.J. party of the second part.

Witnesseth, That the said part of the first part, for and in consideration of the sum of EIGHTY-THREE HUNDRED TEN DOLLARS ($8,310.00), lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents does grant, bargain, sell alien, enfeoff, release, convey and confirm, unto the said party of the second part, its successor and assigs: ALL those certain lots or parcels of land and premises situate, lying and being in the Borough of Avalon, in the County of Cape May and State of New Jersey, known and designated as Block No. 38-C, Lots Nos. 37-A and 37-B; Block No 19-C, Lot No. 38; Block No. 19-C, Lot No. 36; Block No. 18-C, Lot Nos. 37, 31, 29; Block No. 15-C. Lot No. 38; Block No. 6-C, Lot No. 37; as shown on the Tax Map of the said borough.

AND the said party of the second part for itself, its successors and assigns, doth covenant and agree

with the said party of the first part, its successors and assigns, that the said party of the second part for itself, its successors and assigns will within 18 months from October 23, 1959, fill in or cause to be filled in the lots of land and premises herein conveyed, to grade established by the Borough Engineer, suitably top coated with gravel or equivalent to prevent sand from blowing, and will within the aforesaid period erect and complete or cause to be erected and completed upon the hereby granted premises a residential dwelling having not less than a first floor area of 900 square feet. No building shall be more than two stories in height.

PROVIDED always, and this conveyance is made upon the express condition, that if the said party of the second part, its successors or assigns, shall fail to comply with any of the aforesaid conditions and covenants within the time limitation provided therein or as otherwise extended by the Board of Commissioners of the Borough of Avalon, in the County of Cape May, for good cause shown, of which causes the said Board of Commissioners shall be the sole judge and their decision shall be final, then the title and interest in and to said premises hereby conveyed shall be and become wholly void, and the said premises and appurtenances shall revert to and become revested in the said party of the first part, its successors or assigns, without re-entry or any other act or ceremony whatever, as fully as if these presents had not been made.

The aforesaid conditions and covenants, and each and every of them, are hereby expressly made an essential part of this instrument as covenants and conditions running with the land.

Together with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and the profits thereof, and of every part and parcel thereof; And Also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances.

To Have and to Hold the said premises with all and singular the appurtenances, unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever.

In Witness Whereof, the said party of the first part has caused these Presents to be executed by its Mayor, attested by its Clerk to attest and affix its corporate seal to be hereunto affixed, the day and year first above written.

Signed, Sealed and Delivered in the presence of

BOROUGH OF AVALON,
IN THE COUNTY OF CAPE MAY

/s/ _____
MAYOR

Attest:/s/ _____

CLERK

[MUNICIPAL SEAL]
BOOK 1008 PAGE 212

STATE OF NEW JERSEY
COUNTY OF CAPE MAYss.

Be it Remembered, that on this Thirtieth day of November in the year of our Lord one thousand nine hundred and fifty-nine before me, an Attorney-at-Law of N.J. personally appeared Betty E. Crews who being by me duly sworn on her oath saith, that she is the Clerk of the Borough of Avalon, in the County of Cape May the grantor within named, and that Donald G. Everingham is the Mayor that deponent knows the common or corporate seal of said grantor and that the seal annexed to the within Deed or Conveyance is such common or corporate seal; that the said Deed or Conveyance was signed by the said Mayor and the seal of said grantor affixed thereto in the presence of deponent; that said Deed or Conveyance was signed, sealed and delivered as and for the voluntary act and deed of said grantor for the uses and purposes therein expressed, pursuant to a resolution fo the Board of Commissioners of said grantor; and at the execution thereof this deponent subscribed her name thereto as witness.

/s/_____
BETTY E. CREWS

/s/_____

W. RUSSELL EPLER
Sworn and Suscribed the
day and year aforesaid
An Attorney-at-Law
of N.J.

8567

Deed

BOROUGH OF AVALON, IN THE
COUNTY OF CAPE MAY, a munc. corp. &c.

- to -

TRI-GUY HOLDING CO.

Dated November 1959

Received in the Clerk's office in the County of Cape May on the 12th day of December A.D. 1959 at [illegible] o'clock in the forenoon, and recorded in Book 1018 of DEEDS for said County, on pages 209.

/s/
CLERK

EXHIBIT D

This Indenture,

Made this Twenty-fifth day of August in the year of our Lord one thousand nine hundred and sixty-one (1961)

Between

BOROUGH OF AVALON,
A Municipal Corporation of the County of Cape May and State of New Jersey, party of the first part, and TRI GUY HOLDING COMPANY, INC., of 140 Durham Avenue, Metuchen, County of Middlesex and State of New Jersey, party of the second part.

Witnesseth, that said party of the first part, for and in consideration of ONE ($1.00) DOLLAR and other good and valuable consideration lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold aliened, enfeoffed, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part, its heirs and assigns: ALL THOSE CERTAIN lands and premises, situate, lying and being in the Borough of Avalon, County of Cape May and State of New Jersey, more particularly described as follows:

COMPRISING Lot Nos. 12, 14, 16, 18, 20, 107, and 64 in Block 76, Section C, as shown on the Official Tax Map of the Borough of Avalon.

The aforesaid conveyance is made pursuant to Resolution No. 7033 of the said Borough of Avalon duly adopted August 23, 1961.

Together with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and the profits thereof, and of every part and parcel thereof; And Also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and in equity, of the said party of the first part, of, in and to the said premises, with the appurtenances.

To Have and to Hold the said premises with all and singular the appurtenances, unto the said party of the second part, its heirs and assigns, to the proper use, benefit and behoof of the said party of the second part, its heirs and assigns forever.

In Witness Whereof, the said party of the first part has hereunto caused its Mayor to sign and its Clerk to attest and affix its corporate seal to this instrument the day and year first above written.

[MUNICIPAL SEAL]

ATTEST:

/s/_____
Betty E. Crews, Borough Clerk

THE BOROUGH OF AVALON,
a Municipal Corporation of the
State of New Jersey

By:

/s/_____
John McLaren, Mayor

[NOTARY SEAL]

BOOK 1062 PAGE 7

STATE OF NEW JERSEY
COUNTY OF CAPE MAYss.

Be it Remembered, that on this Twenty-fourth day of October in the year of our Lord one thousand nine hundred and sixty-one before me, the undersigned authority personally appeared Betty E. Crews who being by me duly sworn on her oath saith, that she is the Borough Clerk of the Borough of Avalon, a Municipal Corporation of the State of New Jersey, the grantor within named, and that John McLaren is the Mayor that deponent knows the common or corporate seal of said grantor and that the seal annexed to the within Deed or Conveyance is such common or corporate seal; that the said Deed or Conveyance was signed by the said Mayor and the seal of said grantor affixed thereto in the presence of deponent; that said Deed or Conveyance was signed, sealed and delivered as and for the voluntary act and deed of said grantor for the uses and purposes therein expressed, pursuant to a resolution fo the Board of Commissioners of said grantor; and at the execution thereof this deponent subscribed her name thereto as witness.

/s/ Betty E. Crews

Sworn and Subscribed
the day and year aforesaid

[NOTARY SEAL]

Deed

BOROUGH OF AVALON,
a Municipal Corporation

TO

TRI GUY HOLDING COMPANY, INC.
140 Durham Avenue, Metuchen, New Jersey

Dated August 25 1961

Received in the Clerk's office of the County of Cape May on the 6th day of November A.D. 1961 at 9:00 o'clock in the forenoon, and recorded in Book ____ of DEEDS for said County on pages _____.

EXHIBIT E

This Indenture,

Made the 18th day of September in the year of our Lord one thousand nine hundred and sixty-one

Between TRI-GUY HOLDING CO., INC.
406 Main Street

a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office in the Borough of Metuchen County of Middlesex and State of New Jersey party of the first part:

And BOROUGH OF AVALON,
a Municipal Corporation

in the County of Cape May and State of New Jersey, party of the second part;

Witnesseth, that said party of the first part, for and in consideration of ONE DOLLAR AND OTHER GOOD AND VALUABLE CONSIDERATION lawful money of the United States of America, to it in hand well and truly paid by the said party of the second part, at of before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, consented and paid, has given, granted, bargained, sold aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant,

bargain, sell, alien, release, enfeoff, convey and confirm, unto the said party of the second part, its successors and assigns, forever,

ALL that tract or parcel of land and premises, herinafter particularly described, situate, lying and being in the Borough of Avalon in the County of Cape May and State of New Jersey

BEING known and designated as Lots No. 19 and 20 in Block 9A on the official tax map of the Borough of Avalon. (110' x 110').

BEING the same premises conveyed to the party of the first part by deed of The Borough of Avalon, dated October 3, 1958 and recorded October 22, 1958 in Cape May County Deed Book 974 on page 290.

Together with all and singular, the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances, to the same belonging or in any wise appertaining;

Also all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

To Have and to Hold all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and

assigns forever;

In Witness Whereof, the said party of the first part has these presents to be signed by its President and its corporate seal to be hereto affixed and attested by it Secretary, the day and year first above written.

TRI-GUY HOLDING CO., INC.

By /s/_____
Henry E. Raab President

Attest:

/s/_____
George A. Montagna Secretary

State of New Jersey
County of MIDDLESEX ss.:

Be it Remembered, that on this 18th day of September in the year of our Lord one thousand nine hundred and Sixty-one before me, the subscriber, personally appeared GEORGE A. MONTAGNA who being by me duly sworn on his oath does depose and make proof to my satisfaction, that he is the Secretary of the TRI-GUY HOLDING CO., INC. the party mentioned in the within Instrument, that HENRY E. RAAB is the President of said Corporation; that the execution, as well as the making of this Instrument, has been duly authorized by a proper resolution of the Board of Directors of the said Corporation; that deponent well

knows the corporate seal of said Corporation; and the seal affixed to said Instrument is such corporate sean and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said Corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

[CORPORATE SEAL]

/s/ _____
George A. Montagna,
Secretary

EXHIBIT F

This Indenture,

Made the 31st day of January 1969,

Between

TRI-GUY HOLDING CO., INC.,
A corporation existing under and by virtue of the laws of the State of New Jersey having its principal office at 406 Main Street in the Borough of Metuchen in the County of Middlesex and State of New Jersey herein designated as the Grantor,

And

HENRY E. RAAB, THOMAS TUFARO and GEORGE A. MONTAGNA, c/o Moss and Inglese
residing or located at 406 Main Street in the Borough of Metuchen in the County of Middlesex and State of New Jersey herein designated as the Grantees;

Witnesseth, that the Grantor, for and in consideration of Six Hundred ($600.00) Dollars lawful money of the United States of America, to it in hand well and truly paid by the Grantees, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the Grantor being therewith fully satisfied, does by these presents grant, Bargain, sell and convey unto the Grantees forever,

All those certain lands and premises, situate, lying and being in the Borough of Avalon in the County of Cape May and State of New Jersey, more particularly described as follows:

Comprising Lot Nos. 12, 14, 16, 18, 20, 107 and 64 in Block 76, Section C, as shown on the Official Tax Map of the Borough of Avalon.

Being the same premises conveyed to Tri-Guy Holding Company, Inc., by deed of the Borough of Avalon a Municipal Corporation of the County of Cape May and State of New Jersey, dated August 25, 1961 and recorded in the Clerk's Office of the County of Cape May on the 6th day of November, 1961 in Book 1062 of Deeds for said County, page 5.

Together with all and singular the buildings, improvements, ways, woods, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof; And also all the estate, right, title, interest, use, possession, property, claim and demand whatsoever, of the Grantor both in law and in equity, of, in and to the premises herein described, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular, the premises herein described, together with the appurtenances, unto the Grantees and to Grantees' proper use and benefit forever.

And the Grantor covenants that it has not done or executed, or knowingly suffered to be done or executed, any act, deed or thing whatsoever whereby or by means whereof the premises conveyed herein, or any part thereof, now are or at any time hereafter, will or may be charged or encumbered in any manner or way whatsoever.

In all references herein to any parties, persons, entities or corporations, the use of any particular gender or the plural or singular number is intended to include the appropriate gender or number as the text of the within instrument may require.

Wherever in this instrument any party shall be designated or referred to by name or general reference, such designation is intended to and shall have the same effect as if the words "heirs, executors, administrators, personal or legal representatives, successors and assigns" had been inserted after each and every such designation.

In Witness Whereof, the Grantor has caused these presents to be signed and attested by its proper corporate officers and its corporate seal to be hereto affixed the day and year first above written.

ATTEST:

/s/_____
GEORGE A. MONTAGNA Secretary

TRI-GUY HOLDING CO., INC.

By: /s/ _____
HENRY E. RAAB President

Documentary Stamps:

State of New Jersey,
County of Middlesex ss.:

Be it Remembered, that on this 31st day of January 1969, before me, the subscriber,
AN ATTORNEY AT LAW OF NEW JERSEY
personally appeared George A. Montagna who, being by me duly sworn on his oath, deposes and makes proof to my satisfaction, that he is the Secretary of Tri-Guy Holding Co., Inc. the corporation named in the within Instrument; that Henry E. Raab is the President of said Corporation; that the execution, as well as the making of this instrument, has been duly authorized by a proper resolution of the Board of Directors of the said Corporation; that deponent well knows the corporate seal of said Corporation; and that the seal affixed to said Instrument is the proper corporate seal and was thereto affixed and said Instrument signed and delivered by said President as and for the voluntary act and deed of said Corporation, in presence of deponent, who thereupon subscribed his name thereto as attesting witness, and that the full and actual consideration paid or to be paid for the transfer of title realty evidenced by the within deed, as such consideration is defined in P.L. 1968, Sec. 1 (c), is $600.00. Sworn to and subscribed before me, the date

aforesaid,

/s/_____
Robert F. Moss
An Attorney at Law
of New Jersey

/s/_____
George A. Montagna

This deed prepared by:

Robert F. Moss
Attorney at Law
406 Main Street

EXHIBIT G

Deed

This Deed is made on June 14, 1997
BETWEEN
HENRY E. RAAB, THOMAS TUFARO and CLARA V. MONTAGNA, Executrix of the Estate of George A. Montagna

whose post office address is
91 Gatehouse Lane, Edison, NJ 08820

referred to as the Grantor,
AND
HENRY E. RAAB and CLARA V. MONTAGNA, Tenants In Common

whose post office address is
91 Gatehouse Lane, Edison, NJ 08820

referred to as the Grantee.
The words "Grantor" and "Grantee" shall mean all Grantors and all Grantees listed above.

1. **Transfer of Ownership**. The Grantor grants and conveys (transfers ownership of) the property (called the "Property" described below to the Grantee. This transfer is made for the Sum of SEVENTY AND 00/100 ($70.00)
The Grantor acknowledges receipt of this money.

2. **Tax Map Reference**. N.J.S.A. 46:15-1.1)

Municipality of Borough of Avalon Block No 76.03 Lot No. 12, 14, 16,18,20,64,107 Account No.

☐ No property tax identification number is available on the date of this Deed. (Check box if applicable.)

3. **Property.** The Property consists of the land and all the buildings and structures on the land in the Borough of Avalon, County of Cape May and State of New Jersey. The legal description is:

☐ Please see attached Legal Description annexed hereto and made a part hereof. (Check box if applicable.)

Being the same premises conveyed to HENRY E. RAAB, THOMAS TUFARO and GEORGE A. MONTAGNA by Deed from Try-Guy Holding Co., Inc. dated January 31,1969 and recorded in the Office of the Clerk of Cape May County on May 1, 1969, in Book 1210, Page 445. George A. Montagna passed away on July 8, 1988 naming Clara V. Montagna as his Executrix. Letters Testamentary were issued on July 19, 1988.

It is the intent under this Deed to transfer the Interest of Thomas Tufaro to Henry E. Raab and Clara V. Montagna. Clara V. Montagna conveys the interest of George A. Montagna, her husband, as provided for under his Last Will and Testament for which there is no consideration.

Prepared by (print signer's name below signature)

/s/
SAMUEL C. INGLESE, ESQ.

COUNTY OF CAPE MAY
CONSIDERATION $70.00
REALTY TRANSFER FEE [ILLEGIBLE]
DATE 7-9-97 BY [ILLEGIBLE]

The street address of the Property is:
Block 76.03, Lots 12, 14, 16, 81, 20, 64 & 107,
Avalon, New Jersey

4. **Promises by Grantor.** The Grantor promises that the Grantor has done no act to encumber the Property. This promise is called a "covenant as to grantor's acts" (N.J.S.A. 46:4-6). This promise means that the Grantor has not allowed anyone else to obtain any legal rights which affect the Property (such as by making a mortgage or allowing a judgment to be entered against the Grantor).

5. **Signatures.** The Grantor signs this Deed as of the date at the top of the first page. (Print name below each signature.)

Witnessed By:

/s/
(Seal)
HENRY E. RABB

/s/
(Seal)
Samuel C. Inglese,
Attorney at Law of

/s/
THOMAS TUFARO

New Jersey As to
Henry E. Raab and
Clara V. Montagna

/s/_____ /s/_____

(Seal)
As to Thomas Tufaro

C L A R A V .
MONTAGNA,
Executrix of the Estate
of George A. Montagna

STATE OF PENNSYLVANIA,
COUNTY OF MONTOUR SS.:

I CERTIFY that on June 14. 1997 THOMAS TUFARO personally came before me and stated to my satisfaction that this person (or if more than one, each person): (a) was the maker of this Deed; (b) executed this Deed as his or her own act; and, (c) made this Deed for $70.00 as the full and actual consideration paid or to be paid for the transfer of title. (Such consideration is defined in N.J.S.A. 46:15-5.)

RECORD AND RETURN TO: [NOTARY SEAL]
Moss and Inglese, Esq.
406 Main Street
Metuchen, New Jersey 08840

EXHIBIT H

ORDINANCE NO. 416

AN ORDINANCE to vacate portions of 3rd Avenue, 5th Street, Dune Drive, 1st Avene, 7th Street, Avalon Avenue, 8th Street, 9th Street, 26th Street, 27th Street, 28th Street, 29th Street, 30th Street, 32nd Street, 33rd Street, 34th Street, 35th Street, 36th Street, 37th Street, 38th Street, 39th Street, 40th Street, 45th Street, 46th Street, 47th Street, 48th Street, 49th Street, 51st Street, 52nd Street, 53rd Street, 57th Street, 59th Street, 60th Street, 61st Street, 62nd Street, 64th Street, 65th Street, 66th Street, 67th Street, 68th Street, 69th Street, 70th Street, 71st Street, 72nd Street, 74th Street, 75th Street, 76th Street, 77th Street, 78th Street, 79th Street, and 80th Street all in the Borough of Avalon, Cape May County, New Jersey, as hereinafter particularly bounded and described.

WHEREAS, the following particularly bounded and described portions of Streets are not now required for use as public streets, nor will they in the future be required for use as public streets. NOW, THEREFORE, BE IT ORDAINED by the Board of Commissioners of the Borough of Avalon, in the County of Cape May, State of New Jersey, that SECTION 1. The public right, title and interest in, along and upon that portion of the public street known as THIRD AVENUE in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that

portion of THIRD AVENUE , 70 feet wide from the bulkhead line of Townsend's Inlet, said bulkhead line being located 195.84 feet and 176.36 feet Northeastwardly from the Northeasterly line of 6th Street when measured in and along the Northwesterly and Southeasterly lines of Third Avenue respectively, Northeastwardly to the high water line of Townsend's Inlet. SECTION 2. The public right, title and interest in, along and upon that portion of the public street known as FIFTH STREET in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that portion of FIFTH STREET, 60 feet wide, from a point 110 feet northwesterly from the Northwesterly line of Third Avenue, Southeastwardly to the high water line of Townsend's Inlet. SECTION 3. The public right, title and interest in, along and upon that portion of the public street known as DUNE DRIVE in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that portion of DUNE DRIVE, 120 feet wide, from the bulkhead line of Townsend's Inlet, said bulkhead line being located 3.84 feet Northeastwardly from the Northeasterly line of 6th Street and 30.45 feet Northeastwardly from the Southwesterly line of 6th Street when measured in and along the Northwesterly and Southeasterly lines of Dune Drive respectively, Northeastwardly to the high water line of Townsend's Inlet. SECTION 4. The public right, title and interest in, along and upon that portion of the public street known as FIRST AVENUE in the

* * *

STREET, 60 feet wide, from a point 305 feet Southeastwardly from the Southeasterly line of Dune Drive, Southeastwardly to the high water line of the Atlantic Ocean. SECTION 46. The public right, title and interest in, along and upon that portion of the public street known as SEVENTY-FIRST STREET, in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that portion of SEVENTY-FIRST STREET, 60 feet wide, from a point 325 feet Southeastwardly from the Southeasterly line of Dune Drive, Southeastwardly to the high water line of the Atlantic Ocean. SECTION 47. The public right, title and interest in, along and upon that portion of the public street known as SEVENTY-SECOND STREET, in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that portion of SEVENTY-SECOND STREET, 60 feet wide, from a point 365 feet Southeastwardly from the Southeasterly line of Dune Drive, Southeastwardly to the high water line of the Atlantic Ocean. SECTION 48. The public right, title and interest in, along and upon that portion of the public street known as SEVENTY-THIRD STREET, in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that portion of SEVENTY-THIRD STREET, 60 feet wide, from a point 385 feet Southeastwardly from the Southeasterly line of Dune Drive, Southeastwardly to the high water line of the Atlantic Ocean. SECTION 49. The public

right, title and interest in, along and upon that portion of the public street known as SEVENTY-FOURTH STREET, in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that portion of SEVENTY-FOURTH STREET, 60 feet wide, from a point 425 feet Southeastwardly from the Southeasterly line of Dune Drive, Southeastwardly to the high water line of the Atlantic Ocean. SECTION 50. The public right, title and interest in, along and upon that portion of the public street known as SEVENTY-FIFTH STREET, in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that portion of SEVENTY-FIFTH STREET, 60 feet wide, from a point 445 feet Southeastwardly from the Southeasterly line of Dune Drive, Southeastwardly to the high water line of the Atlantic Ocean. SECTION 51. The public right, title and interest in, along and upon that portion of the public street known as SEVENTY-SIXTH STREET, in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that portion of SEVENTY-SIXTH STREET, 60 feet wide, from a point 445 feet Southeastwardly from the Southeasterly line of Dune Drive, Southeastwardly to the high water line of the Atlantic Ocean. SECTION 52. The public right, title and interest in, along and upon that portion of the public street known as SEVENTY-SEVENTH STREET, in the Borough of Avalon, New Jersey, as hereinafter described with particularity, is hereby vacated, surrendered and abandoned. All that portion of SEVENTY-SEVENTH STREET, 60 feet wide, from

a point 505 feet Southeastwardly from the Southeasterly line of Dune Drive, Southeastwardly to the high water line of the Atlantic Ocean. SECTION 53. The public right, title and interest in, along and

* * *

EXHIBIT I

July 13, 1994 State Aid Agreement between the DEP and the Borough of Avalon is not attached because it does not provide information necessary for this petition.

STATE AID AGREEMENT BETWEEN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE BOROUGH OF AVALON

THIS AGREEMENT made and executed this ____ day of ____, Two Thousand And Two BY AND BETWEEN THE BOROUGH OF AVALON, a Municipal Corporation in the County of Cape May, New Jersey, hereinafter called the "Municipality", part of the first part, and the DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF ENGINEERING AND CONSTRUCTION OF THE STATE OF NEW JERSEY, hereinafter called the "Division", part of the second part.

WITNESSETH, THAT: WHEREAS, construction of the Townsends Inlet to Cape May Inlet. New Jersey was authorized by Section 101(a) (26) of the Water Resources Development Act of 1999, Public Law 106-298; and,

WHEREAS, Section 934 of the Water Resources Development Act of 1986, Public Law 99-662, authorized the Government to extend Federal participation in periodic beach nourishment at Townsends Inlet to Cape May Inlet, NJ Shore Protection Project for 50 years after the commencement of the period of initial construction;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611. as amended, and Section 103 of the Water Resources Development Act of 1986,

Public law 99-662, as amended, provide that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project or separable element; and,

WHEREAS, the Division has entered into a project cooperation agreement for the initial construction and the periodic renourishment of the Federally Authorized Beach Erosion Control 50 year life - at Townsend Inlet to Cape May Inlet; and

WHEREAS, the Division and the Municipality desire to enter into a State Aid Agreement for the construction of all components of the Townsends Inlet to Cape May Inlet, New Jersey Shore Protection Project, including construction of seawalls along the Townsends Inlet shorefront in the Borough of Avalon, and the Hereford Inlet Federally Authorized; initial construction of beach and dune storm Damage Reduction Project in Avalon and Stone Harbor including periodic renourishment at three year cycles along the ocean shorefront and the Ecosystem Restoration at Stone Harbor Point

WHEREAS, The cost sharing of this initial construction and periodic renourishment over the life of the project - 50 year life - is 65% Federal and 35% non-Federal; and,

WHEREAS, The non-Federal share shall be cost shared 75% Division and 25% local municipalities;

and,

WHEREAS, The non-Federal interest must provide public access to the beach in accordance with Federal and State Laws and regulations; and,

WHEREAS, The expenditure of public funds are conditioned upon compliance with the Department's rules on Coastal Resources and Development (N.J.S.A. 7:7E-1 et seq.) in four policy areas; Public Access (7:7E-8.11; Beaches (7:7E-3.22; Dunes (7:7E-3.16) and Erosion Hazard Area (7:7E-3.19)

WHEREAS, The Division has the full authority to perform all its responsibilities of the Beach Erosion Control Project under New Jersey State Law Pt 92, c. 148; PL 95, c. 164 and N.J.S.A. 12:6A-1. et seq.; and,

NOW THEREFORE, both parties hereto do mutually agree as follows:

(1) Municipality shall acquire all lands or obtain perpetual easements for public access to the entire beachfront, seawall, re-nourishment activities and protection of threatened and endangered wildlife and vegetation in accordance with Attachment B. Certification of perpetual easements shall be provided to the Division before the start of sand dumping at south end of Borough.

(2) Municipality shall allow the U. S. Army

Corps of Engineers, the Division and its agents the right to access and conduct operations along the beachfront, and seawall, during periods of construction, surveillance, monitoring, engineering and environmental data collection and for protection of threatened and endangered wildlife and vegetation.

(3) The Municipality compliance with the Division's policies on Coastal Zone Management (N.J.S.A. 7:7E-1 et seq.) specifically: Public Access (7:7E-8.11); Beaches (7:7E-3.22); Dunes (7:7e-3.16) and Erosion Hazard Area (7:7E-3.19) refer to Attachment A. This process shall be completed within six months from date of this agreement.

(4) All existing and newly created dunes will be designed with public access crossovers. Bulldozing, excavation or mechanical alteration of any dune is strictly prohibited.

(5) Municipality shall develop and implement a beach nesting bird management plan in accordance with New Jersey Division of Fish and Wildlife requirements. The U.S. Fish and Wildlife Service must also approve the management plan. The New Jersey Division of Fish and Wildlife will

coordinate the plan approval with the U.S. Fish and Wildlife Service. The plan shall be formally adopted through a memorandum of agreement between the Municipality, New Jersey Division of Fish and Wildlife and U.S. Fish and Wildlife Service. This agreement shall allow access on all lands that will benefit from this beach nourishment project. Management activities may temporarily limit public access to this property in order to protect the nesting endangered species, birds.

(6) Municipality shall develop and implement a Sea Beach Amaranth Management in coordination with the New Jersey Natural Lands Management Program and The U.S. Fish and Wildlife Service. The plan shall be formally adopted through a memorandum of agreement between the Municipality, New Jersey Natural Lands Management Program and U.S. Fish and Wildlife Service. This agreement shall allow access on all lands that will benefit from this beach nourishment project. Management activities may temporally limit public access to this property in order to protect the endangered plant species.

(7) The Division shall cost share the non-

Federal share of the funding for the construction of this project on a 75% State 25% Municipal.

(8) The cost of Ecosystem Monitoring and the Engineering Monitoring will be shared between the Corps of Engineers and the Division. The cost for monitoring the Endangered Species will be provided to the State Division of Fish and Game by the Division of Engineering and Construction.

(9) The total estimated cost of the project over the next fifty years is estimated at $167,000,000. This cost includes the initial sand placement, sea wall construction at Townsend and Hereford Inlets, ecosystem restoration and monitoring, and periodic sand re-nourishment every three (3) years.

(10) The initial project cost is estimated at $56,270,912 and is COST SHARED AS follows:

a) INITIAL ESTIMATED PROJECT COST

Beachfill & Sand Dune	$22,662,385
Ecosystem Restoration	$ 1,268,527
Seawall @ Hereford Inlet	$19,600,000
Seawall @ Townsends Inlet	$12,700,000

Total	$56,270,912

b) COST SHARE ESTIMATE BACKFILL, SAND DUNES:

TOTAL COST	$22,682,385
Federal Share 65%	$14,743,550
Non-Federal Share 35%	$ 7,938,835

c) The non-federal share would be then cost shared between the municipalities as follows:

Non-Federal Share	$ 7,938,635
75% State	$ 5,954,126
25% Local	$ 1,984,709

d) Local Cost Share

Stone Harbor	13,188 ft	40.93%	$ 812,342
Avalon	19,037 ft	59.07%	$1,172,368

Percentage is based on length of municipal beachfront vs. total length of beach

e) COST SHARE ESTIMATE ECOSYSTEM RESTORATION

Total Cost	$1,288,527
Federal Share	$ 837,542
Non-Federal Share	$ 450,985

The non-Federal share would be then cost

shared between the State and Stone harbor as follows:

Non-Federal Share	$450,985
75% State	$338,239
25% Stone Harbor	$112,746

f) COST SHARE ESTIMATE STONE SEAWALLS

1) Seawall 8 Hereford Inlet

TOTAL COST	$19,600,000
Federal Share	$12,740,000
Non-Federal Share	$ 6,860,000
75% State	$ 5,145,000
25% North Wildwood	$ 1,715,000

2) Seawall @ Townsends

Total Cost	$12,700,000
Federal Share	$ 8,255,000
Non-Federal Share	$ 4,445,000
75% State	$ 3,333,750
25% Avalon	$ 1,111,250

g) TOTAL COST PER MUNICIPALITY

Stone Harbor

Backfill & Dune	$ 812,746
Ecosystem Restoration	$ 112,746
Total	$ 925,008

Avalon

Backfill & Dune	$ 1,172,368

Townsend's Inlet Seawall	$ 1,111,250
Total	$ 2,283,618

North Wildwood

Hereford Inlet Seawall	$ 1,715,000

(11) The costs of the project may increase due to erosion of beachfront, increase quantity of sand required, and cost for construction. The final cost will be based on actual cost and records maintained by the Division and Corps of Engineers.

(12) The Division will advance the funds necessary for construction of the project.

(13) The Municipality shall provide their share of the estimated cost of the project to the Division by December 1, 2002.

(14) If the Municipality fails to provide its share of the funding required, then the Division is authorized to take the necessary legal action to recover its share plus interest and other expenses.

(15) In the event the Municipality does not comply with this agreement, this will be cause for the Municipality to repay to the Division the State share provided for in this agreement and may affect the Municipality eligibility for future shore protection funds.

IN WITNESS WHEREOF, the municipality and the Office have hereunto set their respective names on the day and year first above written.

BOROUGH OF AVALON

ATTESTED:

BY /s/_____
Martin Pagliughi
Mayor
Borough of Avalon

/s/_____
Amy W. Kleskens
Clerk
Borough of Avalon

STATE OF NEW JERSEY
DEPARTMENT OF
ENVIRONMENTAL PROTECTION
OFFICE OF ENGINEERING & CONSTRUCTION

ATTESTED:

BY _____
David Rosenblatt
Administrator
Office of Engineering & Construction

APPROVED:

BY _____

Amy Cradic
Assistant Commissioner
Natural & Historic Resources

The aforementioned agreement has been received and approved as to form.

_____

Ann Milgram
Attorney General of New Jersey

BY _____
Deputy Attorney General

ATTACHMENT A

7:7E-3.22 BEACHES

(a) Beaches are gently sloping unvegetated areas of sand or other unconsolidated material that extend landward from the mean high waterline to either:

(1) The vegetation line,

(2) A man-made feature generally parallel to the ocean, inlet, or bay waters such as a retaining structure, seawall, bulkhead, road or boardwalk, except that sandy areas that extend fully under and landward of an elevated boardwalk are considered to be beach areas, or

(3) The seaward or bayward foot of dunes, whichever is closest to the bay, inlet or ocean waters.

(b) Beaches can be found on all tidal shorelines, including ocean, bay and river shorelines.

(c) Development is prohibited on beaches, except for development that has no prudent or feasible alternative in an area other than a beach, and that will not cause significant adverse long-term impacts on the natural functioning of the beach and dune system, either individually or in combination with other existing or proposed

structures, land disturbances or activities. Examples of acceptable activities are:

1. Demolition and removal of paving and structures;

2. Dune creation and related sand fencing and planing of vegetation for dune stabilization;

3. The reconstruction of existing amusement and fishing piers and boardwalks;

4. Temporary recreation structures for public safety such as first aid and lifeguard stations;

5. Shore Protection structures which meet the Use conditions of N.J.A.C. 7:7E-7.11(e); and

6. Linear development which meets the policy on Location of Linear Development (N.J.A.C. 1:7E6.1).

(d) Public access and barrier-free access to beaches and the water's edge is encouraged. Coastal development that unreasonably restricts public access to beaches is prohibited.

(e) Undeveloped beaches are vital to the New Jersey resort economy. Unrestricted access for

recreational purposes is desirable so that the beaches can be enjoyed by all residents and visitors of the state. Public access will be required for any beaches obtaining state funds for shore protection purposes. Beaches are subject to coastal storms and erosion from offshore currents. Public health and safety considerations require that structures be excluded from beaches to prevent or minimize loss of life or property from storms and floods, except for some shore protection structures and linear facilities, such as pipelines, when nonbeach locations are not prudent or feasible.

7:7E-3.16 DUNES

(a) A dune is a wind or wave deposited or man-made formation of vegetated or drifting wind blown sand, that lies generally parallel to, and landward of the beach, and between the upland limit of the beach and the foot of the most inland dune slope. "Dune" includes the foredune, secondary and tertiary dune ridges, as well as man-made dunes, where they exist.

1. Formation of sand immediately adjacent to the beaches that are stabilized by retaining structures, and or snow fences, planted vegetation and other measures are considered to be dunes regardless of the degree of modification of the dune by wind or wave action or disturbance by development.

2. A small mound of loose, windblown sand found in a street or on a part of a structure as a result of storm activity is not considered to be a "dune".

(b) Development is prohibited on dunes, except for development that has no prudent of feasible alternative in an area other than a dune, and that will not cause significant adverse long-term impacts on the natural functioning of the beach and dune system, either individually or in combination with other existing or proposed structures, land disturbances or activities. Examples of acceptable activities are:

1. Demolition and removal of paving and structures;

2. Limited, designated access ways for pedestrian and authorized motor vehicles between public streets and the beach that provide for the minimum feasible interference with the beach and dune system and are oriented so as to provide the minimum feasible threat of breaching or overtopping as a result of storm surge or wave run up;

3. Limited stairs, walkways, pathways and boardwalks to permit access across dunes to beaches, provided they cause minimum feasible interference with the beach and dune system;

4. The planting of native vegetation to stabilize dunes;

5. Sand fencing, either a brush type barricade or a picket type, to accumulate sand and aid in dune formation;

6. Shore protection structures which meet the use conditions of N.J.A.C. 7:7E-7.11(e); and

7. Linear development which meets the Policy on Location of Linear Development (N.J.A.C. 7:7E6.1).

(c) Ocean and bayfront dunes are an irreplaceable physical feature of the natural environment possessing outstanding geological, recreational, scenic and protective value. Protection and preservation in a natural state is vital to this and succeeding generations of citizens of the State and the Nation. The dunes are a dynamic migrating natural phenomenon that helps protect lives and property in adjacent landward areas, and buffers barrier islands and barrier beach spits from the effects of major natural coastal hazard such as hurricanes, storms, flooding and erosion. Natural dune systems also help promote wide sandy beaches and provide important habitats for wildlife species.

7.7E-3.19 EROSION HAZARD AREAS

(a) Erosion hazard areas are shoreline areas that are eroding and/or have a history of erosion, causing them to be highly susceptible to further erosion and damage from storms.

1. Erosion hazard areas may be identified by any one of the following characteristics: i. Lack of beaches, ii. Lack of beaches at high tide, iii. Narrow beaches, iv. High beach mobility, v. foreshore extended under a boardwalk, vi. Low dunes or no dunes, vii. Escarped foredune, viii. Steep beach slopes, ix. Cliffed bluffs adjacent to beach, x. Exposed, damaged or breached jetties, groins, bulkhead or seawalls, xi. High long term erosion rates, and xii. Pronounced downdrift effects of groins (jetties).

2. Erosion hazard areas extend inland from the edge of a stabilized upland area to the limit of the area likely to be eroded in 30 years for one to four unit dwelling structures, and 60 years for all other structures, including developed and undeveloped areas. This distance is measured from the crest of a bluff for coastal bluff areas; the most seaward established dune crest for unvegetated dune areas, the first vegetation line from the water for established vegetated dune areas, and the landward edge of a beach

or the eight foot (NGVD) contour line, whichever is farther inland, for non-dune areas.

I. An established, unvegetated dune is a dune that has been in place tor at least two winter seasons, or has been constructed with the approval of the Department.

ii. An established vegetated dune is a dune with an existing vegetative cover which has been growing on site for at least two growing seasons.

3. The extent of an erosion hazard area is calculated by multiplying the projected annual erosion rate at a site by 30 for the development of one to four unit dwelling structures and by 60 for all other developments.

(b) Development is prohibited in erosion hazard areas, except for:

1. Linear development which meets the policy on location of Linear Development (N.J.A.C. 7:7E-6.1); and

2. Shore protection activities which meet the appropriate Coastal Engineering Use Policies (N.J.A.C. 7:7E-7.11).

3. Single story, beach/tourism oriented commercial developments located within an already developed municipal boardwalk/commercial area of Point Pleasant Beach, Seaside Heights, Ocean City, North Wildwood and Wildwood City is conditionally acceptable provided that it meets the following conditions:

I. The site is located within an area currently used and zoned for beach related commercial use, and is landward of an adjacent to the boardwalk;

ii. The height of the building does not exceed 15 feet measured from either the elevation of the existing ground or the boardwalk (depending on the specified site conditions) to the top of a flat roof or the mid-point of a sloped roof;

iii. The facility is open to the general public and supports beach/tourism related recreational activities, i.e. retail, amusement and food services. Lodging facilities are excluded; and

iv. The facility meets all the flood proofing requirements of the Flood Hazard Area Policy.

4. Single family and duplex infill developments that meet the standards of N.J.A.C. 7:1E-7.2(f).

(c) As a result of continuing rising sea level(s and), active storm induced sand movements, and offshore currents (littoral drift), most the Atlantic coastline of New Jersey is retreating. Coastal erosion also affects the bayshores of New Jersey. The rate of retreat or erosion, is not uniform, and varies locally depending upon the nature and magnitude of coastal processes operating within individual parts of the shoreline. Certain parts of the shoreline have a higher risk for further erosion.

7:7E-8.11 PUBLIC ACCESS TO THE WATERFRONT

(a) "Public access to the waterfront" is the ability of all members of community at large to pass physically and visually to, from and along the ocean shore and other waterfronts.

(b) Coastal development adjacent to all coastal waters, including both natural and developed waterfront areas, shall provide permanent perpendicular and linear access to the waterfront to the maximum extend practicable, including both visual and physical access. Development that limits public access and the diversity of waterfront experiences is discouraged.

1. All development adjacent to the water shall, to the maximum extent practicable, provide, within its site boundary, a linear waterfront strip accessible to the public. If there is a linear waterfront accessway on either side of the site and it is not feasible to continue it within the boundaries of the site, a pathway around the site connecting to the adjacent parts, or potential parts of the waterfront path system in adjacent parcels shall be provided.

2. Municipalities that do not currently provide, or have active plans to provide, assess to the water will not be eligible for Green Acres or Shore Protection Bond funding.

3. Public access shall be clearly marked, provide parking where appropriate, be designed to encourage the public to take advantage of the waterfront setting, and shall be barrier free where practicable.

4. A fee for access to, including parking where appropriate, or use a publicly owned waterfront facilities shall be no greater than that which is required to operate and maintain the facility and shall not discriminate between residents and non-residents except that municipalities may set a fee schedule

that charges up to twice as much to nonresidents for use of the marinas and boat launching facilities for which local funds provide 50 percent or more of the costs.

5. All establishments, including marinas and beach clubs, which control access to tidal waters shall comply with the Law Against Discrimination, N.J.S.A. 10:5.1 et seq.

6. Public access, including parking where appropriate, shall be provided to publicly funded shore protection structures and to waterfronts created by public projects unless such access would create a safety hazard to the user. Physical barriers and local regulations which unreasonably intertere with public access to, along or across a structure are prohibited.

7. Development within the Hudson River Waterfront Special Area shall conform with the additional requirements of N.J.A.C. 7:7E-3.48.

8. Development along Raritan Bay within Monmouth County shall be consistent with the Bayshore Waterfront Access Plan (Monmouth County Planning Board and the Trust for Public Land for NJDEP, 1987).

9. Development elsewhere in the Coastal Zone shall conform with any adopted municipal, county or regional waterfront access plan, provided the plan is consistent with the Rules on Coastal Zone Management.

10. The Department may require some or all of the public access portion of a site to be dedicated for public use through measures such as conservative easements.

11. Development adjacent to coastal waters shall provide fishing access within the provision of public access wherever feasible and warranted.

12. Development adjacent to coastal waters shall provide barrier free access within the provisions of public access wherever feasible and warranted by the characteristics of the access area.

ATTACHMENT B

BOROUGH OF AVALON

PERPETUAL EASEMENTS WILL BE ACQUIRED FOR PUBLIC ACCESS AND USE. EASEMENTS WILL ALSO AUTHORIZE THE ARMY CORPS OF ENGINEER, AGENTS EMPLOYEES, CONTRACTOR AND STATE EMPLOYEES TO ENTER UPON THE BEACH.

BLOCK NO.	LOT	DESCRIPTION/REMARKS
81	1	Public Beach
77.03	12,14	"
76.03	12,14,16, 18,20	"
75.02	2,4,6,64,61	"
75.03	103,105,107	"
74.03	59,61,63,104, 106,108,2,4,6	"
73.02	106,108	"
73.01	62,64	"
72.02	57,59	"
72.01	16,18,20	"
71.02	97,99,101,58, 56,54	"
69.02	70,72	"
66.03	89,91	"
64.02	98,100	"
59.02	93,94,95	"
58.02	105,107	"
55.02	53,55	"

55.03	45,47,90.92	"
54.02	106,108	"
52.03	50,52	"
49.03	46,48,89,91	"
47.03	46,48	"
46.02	16	"
45.03	25 THRU 30	"
45.02	20	"
42.02	6	"

ALL LOTS ARE EAST OF DUNE LINE, AND THERE ARE NO STRUCTURES ON THESE PARCELS - BOROUGH NEEDS TO CERTIFY AS TO OWNERSHIP

FREDERICK W. SCHMIDT, JR.
ATTORNEY AT LAW
106 NORTH MAIN STREET, UNIT D, P.O. BOX 120
CAPE MAY COURT HOUSE, NJ 08210-0120
Telephone: (609) 465-2300 Fax: (609) 465-4061
E-Mail: fws.law@verizon.net

PLEASE REFER TO
OUR FILE NO.: 3351

March 16, 2001

James A. Waldron, Esquire
376 96th Street
Stone Harbor, NJ 08247

RE: Block 76.03 (formerly Bl. 76C), Lots 12, 14, 16, 18, 20, 64 and 107 (140' x 120')
Borough of Avalon
Owned by Raab and Montagna

Dear Jim:

I represent Henry E. Raab and Clara V. Montagna, the current owners of the above premises in question (PIQ) located in Avalon at 76th Street and the beach. The acquisition history is set forth below.

1. On August 25, 1961, Avalon conveyed the PIQ to Tri-Guy Holding Company, Inc., a New Jersey Corporation ("Tri-Guy") consisting of three stockholders: Henry E. Raab, Thomas Tufaro and George A. Montagna. Resolution No. 7033 adopted

August 23, 1961 confirmed this conveyance to Tri-Guy and explained that the consideration paid by Tri-Guy was the conveyance of Block 9A, Lots 19 and 20 to Avalon by Tri-Guy.

2. On January 31, 1969, Tri-Guy conveyed the PIQ to its three stockholders, Henry E. Raab, Thomas Tufaro and George A. Montagna

3. On June 14, 1997, after Mr. Montagna's death, Henry E. Raab, Thomas Tufaro and Clara V. Montagna, as Executrix for the Estate of George A. Montagna, conveyed the PIQ to Henry E. Raab and Clara V. Montagna.

At the time of the conveyance of the PIQ by Avalon to Tri-Guy on August 25, 1961, my clients believed that the PIQ was zoned to permit construction of a single family residence without any restriction on sand removal for construction.

On June 5, 1968, the Borough of Avalon adopted Ordinance 393 which prohibited sand removal, sand relocation, and all other use of the beach dune area, except for recreation, unless approved by the Borough Commissioners.

Pursuant to Ordinance 415 adopted August 20, 1969, Avalon imposed a dune line which placed the PIQ 40 feet east of the dune line (see the attached survey and tax map) in an area where all construction is prohibited.

Pursuant to Ordinance 614 adopted January 30, 1979, the zoning for the PIQ was changed to P-U (Public Use) which prohibited all permanent construction and permitted only limited recreational use of the PIQ.

Please indicate if you can provide me with the beach dune and zoning regulation that applied to the PIQ on August 25, 1961 (the date of purchase from the Borough) and the changes that occurred thereafter. As requested, a copy of this letter with attachments has been sent to Andrew Bednarek, the Borough Administrator and Matthew Ecker, the Assistant Borough Engineer.

My clients wish to sell the PIQ to any willing purchaser or the Borough for a fair market price that assumes the lot can be used for the construction of a single family residence. If the Borough is not interested in purchasing the PIQ, then my clients request that the Mayor and Council rezone the parcel to permit construction of a single family residence, which is compatible with the existing neighborhood, and move the dune line to the east side of the PIQ. If the Commissioners are not inclined to provide this relief, or purchase the PIQ, or negotiate a settlement of some sort, then my clients will have no recourse except to sue the Borough for "inverse condemnation."

In the meantime, I wish to point out that the Borough is now and has been using a 20' wide strip of the PIQ for public beach access without my clients' permission and they wish to be compensated for the

past, present and future use of the PIQ for public beach access.

Please advise.

Very truly yours,

Frederick W. Schmidt, Jr.

FWS:cw
enc.

cc: Andrew J. Bednarek, w/attachments
Matthew Ecker, w/attachments
Clients, w/o attachments
Samuel C. Inglese, Esq., w/o attachments

BOROUGH OF AVALON
3100 Dune Drive
Avalon, New Jersey 08202

ANDREW J. BEDNAREK
Business Administrator Phone: 609-967-4148

July 21, 1983

Peter L. Koury, Esq.
SCHMIDT, ASSAN & KOURY
One South Main Street
P. O. Box 908
Cape May Court House, NJ 08210

Re: Block 76.03, Lts. 12, 14, 16, 18, 20, 64 and 107

Dear Mr. Koury:

In reference to your letter of July 13, please be advised that the Borough of Avalon is not interested in purchasing lots from your clients at this time.

Thank you for your attention to this matter.

Sincerely,

/s/

Andrew J. Bednarek
Business Administrator

AJB/dbr
c.c. George W. Powell, Jr., Tax Assessor

[DATE STAMP]
RECEIVED
7-22-83

April 29, 1965

Honorable John McLaren, Mayor
Borough of Avalon
Avalon, New Jersey

Dear Sir:

This letter is in regard to our conversation of April 26, 1965, at your office. In 1961 we owned Block #9A, Lots 19-20 on 9th Street, ocean front (110 x 110). A storm came along and washed away a portion of it. The Borough of Avalon asked us to exchange those lots so that the Borough could erect a Bulk Head to prevent any further soil erosion of the island.

At the present time there is a house on a portion of that property which is occupied by a doctor.

The lots were purchased from the Board of Avalon for $4,500. We had them filled and toped at an approximate cost of $300, plus taxes for the year. We owned the lots for a cost of $5,500.

In exchange we accepted Block #76C Lots 12, 14, 16, 18, 20, 64, 107, 130 and 110. On April 26, we visited the lots with the intention of building a home,

and we found that the sand barrier in on the property in question and we cannot, therefore, build on those lots. We are now requesting that the Borough of Avalon exchange Block #76C Lots 12, 14, 16, 18, 20, 64, 107, 130, and 110, for Block #68C Lots 1, 2, and 3, which have a comparable assessed value of $6,600, and is presently owned by the Borough of Avalon.

We understand that the Borough has a formula that they use in similar cases of this type. Will you please give this your kindest attention.

Thanking you in advance,

TRI-GUY HOLDING CO.
25 Remington Drive,
Metuchen, New Jersey

GAM:ceg

Resolution No. 62-102

Subject: Authorization to Enter Property to be used as protective barriers

WHEREAS, the great Atlantic storm of March 1962 has caused severe damage to the shore front of the Borough of Avalon, and

WHEREAS, it is in the best interests of the Borough of Avalon to restore the sand dunes, vegetation and other protections which heretofore existed along the shore line, and

WHEREAS, the Borough of Avalon finds that there exists a threat or danger to life and property by reason of the damage to or the destruction of sand barriers and other natural or man-made barriers which protect the Borough, and that it is necessary to the health, safety and welfare of the Borough of Avalon to repair, restore, replace or construct such protective barriers

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioner of the Borough of Avalon, in the County of Cape May, State of New Jersey, that for the purpose of providing the aforesaid protective barriers the proper officials, agencies and/or representatives of the Borough of Avalon be and are hereby authorized to enter immediately upon property to be used as protective barriers to take control and possession thereof, and to do such acts as may be required, including removing, destroying or otherwise

disposing of any property located thereon without first paying any compensation therefor.

BE IT FURTHER RESOLVED that no entry shall be made upon such property for a period of at least 5 days following the passage of such resolution, unless the governing body shall find that the public safety and interest requires that entry be made within a shorter period of time.

Resolution No. 62-117

Subject: Resolution Stating an Emergency to Exist in the Borough of Avalon as a result of the Storm of March, 1962, Authorizing Mayor to Enter into an Agreement

WHEREAS, there exists a threat or danger to life of persons and property in the municipality by reason of damage to or destruction of sand barriers which protect the municipality's shore front, and

WHEREAS, it is necessary to the health, safety and welfare of the municipality to repair, restore, replace, or construct protective barriers, and

WHEREAS, the United States of America, pursuant to P.L. 875, & 81, and the State of New Jersey, pursuant to Senate Bill 297 enacted May 21, 1962, may give aid and assistance to the municipality and

WHEREAS, the municipality is desirous of obtaining such aid and assistance and is lending full cooperation for such purposes,

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the Borough of Avalon, in the County of Cape May, and State of New Jersey, that for the purpose of providing protective barriers required for the protection of life and property of the municipality br reason of damage to and destruction of

barriers, the Mayor, as the chief executive official, is hereby authorized to appoint agents, servants and contractors, to repair, restore, replace and construct protective barriers for the protection of life and property of the municipality.

BE IT FURTHER RESOLVED that as public safety requires, the owners shall be given five (5) days notice of such entry.

BE IT FURTHER RESOLVED that the Mayor is hereby authorized and directed as chief executive official to enter into an Agreement on behalf of the municipality, whereby the municipality shall:

a. hold and save harmless the State and Federal Governments or any agency thereof free from damages which may arise as a result of the aforesaid shore protection work;

b. acquire all lands, easements, rights of way or other areas within the municipality if required in connection with the work undertaken;

c. maintain and preserve the protective barriers constructed, repaired or restored;

d. do such other acts as may be necessary to carry out the terms of the Agreement; and

e. furnish police action as may be required.

BE IT FURTHER RESOLVED that an ordinance be introduced and adopted forthwith to effectuate the terms and objectives of this resolution.

Dated: September 19, 1962

/s/
John McLaren

Attest:

/s/
Borough Clerk

/s/
W. Daniel Keen

/s/
Dominick Schiavone

COMMISSIONERS

Instroduced by Mayor McLaren
On motion of Commissioner Schiavone
Seconded by Commissioner Keen

Resolution No. 62-103

Subject: Authorization to Waive Bids for Sand Dunes

WHEREAS, according to R.S. 40:25-3 it is necessary because the emergency created by the Storm of March 1962, and the imminence of the hurricane season to construct protective barriers in the form of Sand Dunes between 13th and 80th Streets immediately

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the Borough of Avalon, in the County of Cape May, State of New Jersey that the requirement of advertisement for bids for the construction of such sand dunes be dispensed with because of the urgency such construction demands.

DATED: August 15, 1962

/s/
John McLaren

Attest:

/s/
Borough Clerk

/s/
W. Daniel Keen

/s/
Dominick Schiavone

COMMISSIONERS

Introduced by Mayor McLaren
On motion of Commissioner Schiavone
Seconded by Commissioner Keen

Verbatim Recitation of Statutes in the Case

N.J.S.A. 2A:14-1. 6 years - Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in *sections 2A:14-2* and *2A:14-3* of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

N.J.S.A. 20:1-1.(Eminent Domain Act in effect from 1940 to 1971) Except as otherwise provided by law, whenever the proper officers of the state, or of any county, or of any municipal corporation, or of any other corporation, public or private, having power to take land or other property for public use, shall have determined to acquire land or other property pursuant to authority conferred by law and cannot acquire such land or other property by agreement with the owner, whether by reason of disagreement as to the price, or the legal incapacity or absence of the owner, or his inability to convey valid title, or the lack of authority of the party determining to acquire the property to do so by agreement, or by reason of any other cause, the compensation shall be ascertained and paid in the manner directed by this chapter.

N.J.S.A. 20:3-5. Jurisdiction - The court shall have jurisdiction of all matters in condemnation, and all matters incidental thereto and arising therefrom, including, but without limiting the generality of the foregoing, jurisdiction to determine the authority to exercise the power of eminent domain; to compel the exercise of such power; to fix and determine the compensation to be paid and the parties entitled thereto, and to determine title to all property affected by the action.

N.J.S.A. 20:3-6. Application of act - Whenever any condemnor shall have determined to acquire property pursuant to law, including public property already devoted to public purpose, but cannot acquire title thereto or possession thereof by agreement with a prospective condemnee, whether by reason of disagreement concerning the compensation to be paid or for any other cause, the condemnation of such property and the compensation to be paid therefor, and to whom payable, and all matters incidental thereto and arising therefrom shall be governed, ascertained and paid by and in the manner provided by this act; provided, however, that no action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through bona fide negotiations with the prospective condemnee, which negotiations shall include an offer in writing by the condemnor to the prospective condemnee holding the title of record to the property being condemned, setting forth the property and interest therein to be acquired, the compensation offered to be paid and a reasonable disclosure of the manner in which the amount of such

offered compensation has been calculated, and such other matters as may be required by the rules. Prior to such offer the taking agency shall appraise said property and the owner shall be given an opportunity to accompany the appraiser during inspection of the property. Such offer shall be served by certified mail. In no event shall such offer be less than the taking agency's approved appraisal of the fair market value of such property. A rejection of said offer or failure to accept the same within the period fixed in written offer, which shall in no case be less than 14 days from the mailing of the offer, shall be conclusive proof of the inability of the condemnor to acquire the property or possession thereof through negotiations. When the holder of the title is unknown, resides out of the State, or for other good cause, the court may dispense with the necessity of such negotiations. Neither the offer nor the refusal thereof shall be evidential in the determination of compensation.

N.J.S.A. 20:3-8. Commencement of action - The action shall be instituted by filing of a verified complaint in form and content specified by the rules and shall demand judgment that condemnor is duly vested with and has duly exercised its authority to acquire the property being condemned, and for an order appointing commissioners to fix the compensation required to be paid.

N.J.S.A. 20:3-9. Process - After the filing of the complaint, the condemnor shall issue and with due diligence, cause process to be served or published in accordance with the rules. Notice given and process

served or published in accordance with the rules shall be effective to bind all condemnees.

N.J.S.A. 20:3-10. Lis pendens - Within 14 days after the filing of the complaint, the condemnor shall cause to be filed and recorded in the recording office, a notice of the pendency of the action, in form and content specified by the rules. Such notice shall include the title of the action; the docket number thereof, if known; the date of the commencement of the action, a description of the property and the interests therein being condemned, as set forth in the complaint; and the names and addresses of all condemnees known to the condemnor and the nature of their alleged interests in said property. The lis pendens shall be indexed by the recording official, listing the condemnees as grantors and the condemnor as grantee. In default of such record, persons acquiring an interest in or lien upon the property without actual notice of the action, shall not be bound thereby but the failure to comply with the provisions of this section shall not otherwise affect such proceedings.

N.J.S.A. 20:3-17. Possession of property and declaration of taking - At any time contemporaneous with or after the institution of an action and service of process, the condemnor may file in the action, when empowered to do so by law, and if so filed, shall also file in the recording office, a declaration of taking, duly executed by an executive official of the condemnor, in form and content specified by the rules, including the following: (a) a statement that possession of all or some part of the property being condemned is thereby

being taken by the condemnor; (b) a specific reference to the statute, article and section thereof, under which the action and declaration of taking is authorized; (c) a description and plot plan of the property being condemned, and, if not the entire property, the portion thereof of which possession is being taken, sufficient for identification thereof, specifying the municipality or municipalities in which the same is located; the street number of the property, if any; the lot and block number of the property as designated upon the current assessment map, if any. In case of a partial taking, the information above specified shall include the entire property of the condemnee, and the portion thereof being taken; (d) the names and addresses of all condemnees known to the condemnor after reasonable investigation, and the nature of their interests in the property; (e) a statement of the estate or interest therein being condemned; (D a statement of the sum of money estimated by the condemnor to be just compensation for the taking, which sum shall be not less than the amount of the offer, in writing, provided for in section 6 hereof. *[FN1]* (g) Any other matter required by the rules.

N.J.S.A. 20:3-18. Deposit of estimated compensationSimultaneously with the filing of the declaration of taking, the condemnor shall deposit the amount of such estimated compensation with the clerk of the court. The amount so deposited shall be not less than the amount offered pursuant to section 6 hereof, and if an award has been made by commissioners hereunder, or a judgment determining compensation

has been entered at the time of the filing of such declaration, the amount so deposited shall be not less than the amount of such award or judgment.

Any amount so deposited shall not be subject to the fees set forth in *N.J.S. 22A:2-20.*

N.J.S.A. 20:3-19. Right to possession and vesting of title -A copy of the declaration of taking and notice of the filing thereof and of the making of the aforesaid deposit, shall be served upon the condemnee and all occupants of the property in accordance with the rules, and proof of such service shall be filed in the action. Thereupon, the right to the immediate and exclusive possession and title to the property described in the declaration of taking shall vest in the condemnor, free and discharged of all right, title, interest and liens of all condemnees without the necessity of further process provided however, that the court may, upon application and good cause shown, stay the taking of possession of the land or other property, or authorize possession to be taken upon prescribed conditions. A property owner who refuses to vacate said property or yield possession and remains in possession more than 20 days after service of notice shall be deemed a trespasser and shall be then liable for rents, issues and profits 20 days after service. The court, upon notice and after determining that the property owner has had adequate opportunity to obtain any funds payable to him under sections 23 and 26 of this act [FN1] and any other expenses to which he may be entitled to as a matter of law, shall enter an order for

possession directed to the sheriff of the county in which the property is located. If the owner or tenant occupies the property with the condemnor's permission on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short term occupier. Such right, title and interest shall be transferred and shall attach to the compensation determined to be payable hereunder, to the same extent and in the same order of priority as existed at the date of vesting of title in condemnor. The pendency of an appeal from an award or judgment hereunder shall not interfere with such vesting of title.

N.J.S.A. 20:3-21. Date of vesting of title - Title to the property condemned shall vest in the condemnor as of the earliest date of the happening of any of the following events: (a) Filing and recording the declaration of taking and depositing funds pursuant to sections 17 and 18 of this act; [FN1] (b) Filing and recording in the recording office of the report of commissioners and payment of the award; (c) Filing in the action and recording in the recording office, an agreement between condemnor and condemnee fixing the date as of which title shall vest;(d) Paying and satisfying of record a final judgment fixing compensation payable hereunder.

N.J.S.A. 20:3-26. Expenses of condemnee - a. The condemnor, as soon as practicable after the date of payment of the acquisition price or the date of deposit in court of funds to satisfy the award of compensation, whichever is earlier, shall reimburse the owner for

actual expenses he necessarily incurred for (1) recording fees, transfer taxes and similar expenses incidental to conveying such real property to the condemnor; and (2) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the condemnor, or the effective date of possession of such real property by the condemnor, whichever is earlier; and (3) penalty costs for prepayment of any mortgage entered into in good faith encumbering real property if the mortgage is on record or has been filed for record as provided by law on the date of approval by the taking agency of the location of the project. As used in this subsection "taking agency" means an "agency" as defined under section 3 of P.L.1972, c. 47 (C.27:7-74). b. If the court renders final judgment that the condemnor cannot acquire the real property by condemnation or, if the condemnation action is abandoned by the condemnor, then the court shall award the owner of any right, or title to, or interest in such real property, such sum as will reimburse such owner for his reasonable costs, disbursements and expenses actually incurred, including reasonable attorney, appraisal, and engineering fees. c. When a plaintiff shall have brought an action to compel condemnation against a defendant having the power to condemn, the court or representative of the defendant in case of settlement shall, in its discretion, award such plaintiff his reasonable costs, disbursements, and expenses, including reasonable appraisal, attorney and engineering fees actually incurred regardless of whether the action is terminated by judgment or amicable agreement of the parties.

N.J.S.A. 20:3-29. Compensation - The condemnee shall be entitled to compensation for the property, and damages, if any, to any remaining property, together with such additional compensation as provided for herein, or as may be fixed according to law.

N.J.S.A. 20:3-30. Date as of which compensation shall be determined Just compensation shall be determined as of the date of the earliest of the following events: (a) the date possession of the property being condemned is taken by the condemnor in whole or in part; (b) the date of the commencement of the action; (c) the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee; or (d) the date of the declaration of blight by the governing body upon a report by a planning board pursuant to section 38 of P.L.1971, c. 361 *(C. 20:3-38)*, or, in the case of a property being maintained as an abandoned property for failure to remove the property from the abandoned property list, as provided pursuant to subsection c. of section 37 of *P.L. 1996, c. 62 (C. 55:19-56)*, if there was no declaration of blight, as of the date of expiration of the condemnee's right to appeal inclusion of the property on the abandoned property list.

N.J.S.A. 46:16-1.1. Decrees of former chancery court and final judgments affecting real estate; recording as deeds; indexing - Certified copies of final decrees of the former Court of Chancery, final judgments of courts of record of this State and of the United States and certified copies of declarations of taking and of reports of condemnation commissioners which have been filed

with the Clerk of the Superior Court or with the Clerk of the United States District Court relating to or in any way affecting title to real estate may be recorded as deeds of conveyance in the office of the county recording officer of the county wherein the real estate is situate, and shall be indexed in the names of the parties to the cause as set forth in the decree, judgment, declaration of taking or report of commissioners which when recorded shall from that time be notice to all subsequent judgment creditors, purchasers and mortgagees of the existence and contents thereof.

46:22-1. Failure to record or register deeds or instruments; effect as to subsequent judgement creditors, purchasers and mortgagees - Every deed or instrument of the nature or description set forth in *section 46:16-1* of this title shall, until duly recorded or lodged for record in the office of the county recording officer in which the affected real estate or other property is situate, be void and of no effect against subsequent judgment creditors without notice, and against all subsequent bona fide purchasers and mortgagees for valuable consideration, not having notice thereof, whose deed shall have been first duly recorded or whose mortgage shall have been first duly recorded or registered; but any such deed or instrument shall be valid and operative, although not recorded, except as against such subsequent judgment creditors, purchasers and mortgagees.

54:4-31. Abstract of deed mailed to assessor - Within one week thereafter the officer with whom the deed or

other instrument shall have been recorded shall mail an abstract thereof, together with the address of the grantee, to such assessor, collector or other custodian who shall properly note the facts therein contained. The abstract shall contain the names of the grantor and grantee and an exact description of the property conveyed as set forth in the deed or instrument of conveyance, together with the date of presentation thereof for record.

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No. 10-881

Supreme Court, U.S.
FILED
MAR 9 - 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HENRY RAAB and CLARA MONTAGNA,

Petitioners,

v.

THE BOROUGH OF AVALON, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey

RESPONDENT BOROUGH OF AVALON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners are jurisdictionally barred under United States Supreme Court Rule 13.

2. Whether Petitioners fail to present an issue worthy of consideration by this Court.

3. Whether Petitioners bring before the Court issues not adjudicated below and/or issues related to nonparties.

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STATEMENT OF THE CASE

Petitioners recite in their "STATEMENT OF THE CASE: FACTS" various arguments and misstatements that do not appear of record anywhere below. To dissect allegation-by-allegation this portion of the Petition would fly in the face of judicial economy and the requirement of brevity of submissions to the Court. Respondent, Borough of Avalon (hereinafter "Avalon"), respectfully submits that the facts of this matter are as detailed in the decision of the Appellate Division of the New Jersey Superior Court in *Raab v. Borough of Avalon*, 392 N.J. Super. 499 (App. Div. 2007), certif. denied, 192 N.J. 475 (2007). In this published opinion, the Court clearly stated the facts of the case as well as the procedural history to that point in time. Avalon hereby incorporates the factual findings of the Appellate Division of the New Jersey Superior Court in *Raab v. Borough of Avalon*, 392 N.J. Super. 499 (App. Div. 2007), certif. denied, 192 N.J. 475 (2007) herein by reference. These facts are included at pages A-33 to A-42 of the Petition.

Since the decision in *Raab v. Borough of Avalon*, 392 N.J. Super. 499 (App. Div. 2007), certif. denied, 192 N.J. 475 (2007), Petitioners have attempted to get several more bites at the apple despite being initially denied Certification by the New Jersey Supreme Court on September 7, 2007. First, they created an application with the Trial Court in an attempt to revisit issues long adjudicated. That application was denied on April 25, 2008. There, the Trial Judge stated, "This motion now almost one year later seeks

to open the final judgment to clarify and for other relief. Consistent with Plaintiffs' conduct throughout this litigation the delay of one year to seek relief is extraordinary especially when these same issues have been presented in the briefing in the Appellate Court." (A-22 to A-23 of the Petition).

It was this decision, where the Trial Court found all of Petitioners' arguments to be rehashings of prior arguments that had been finally disposed of for at least a year prior to April 25, 2008, which Petitioners took back to the Appellate Division in an attempt at yet another bite of the apple. The Appellate Division, on July 28, 2009, in an unpublished opinion reproduced at pages A-3 to A-17, characterized that appeal as "nothing more than an effort to re-litigate issues already adjudicated." (A-16 of the Petition). The Appellate Division went on to state, "[W]e will not address here the claims based upon payment of taxes over the years, failure of the Borough to have followed the statutory procedures for an eminent domain proceeding, failure of the Borough to have identified specific lots, as opposed to more generally defining the area taken as the beachfront strip between 13th Street and 80th Street, and the like. We have already rejected these issues in the prior appeal."

Thus, as of July 28, 2009, both the Trial Court and the Appellate Division of the New Jersey Superior Court had clearly opined, in effect, that Petitioners' litigation tactic had become to simply attempt to re-litigate issues adjudicated and settled in 2007. The New Jersey Supreme Court once again denied

certification on June 30, 2010 (A-1 of the Petition). Then, in response to Petitioners' motion to the New Jersey Supreme Court for reconsideration of the Court's second denial of certification, the Court issued a denial of same on October 7, 2010.

It is important to note that what the New Jersey Supreme Court had disposed of in April and October of 2010, through its second denial of certification and its denial of Petitioners' motion for reconsideration of that second denial of certification, was the Trial and Appellate Courts' refusal in 2009 to reopen a case that was judicially done and over with in 2007.

REASONS FOR DENYING WRIT

I. PETITIONERS HAVE FILED A PETITION OVER WHICH THE COURT LACKS JURISDICTION UNDER RULE 13, INASMUCH AS THE FILING WAS OUT OF TIME.

Rule 13 of the Rules of the United States Supreme Court states in relevant part,

> **1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.** * * *

> **2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e.g.*, 28 U.S.C. §2101(c).**
>
> **3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, * * * the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing * * * .**

Here, assuming that a motion for reconsideration of denial of certification presented to the New Jersey Supreme Court in the context of this case qualifies as a "motion for rehearing" under Rule 13, which Avalon does not concede, Petitioners were required to file their Petition on or before January 4, 2011. Tuesday, January 4, 2011, is the 90th day after October 7, 2010, the date on which the New Jersey Supreme Court denied Petitioners' motion for reconsideration of its second denial of certification (A-62 of the Petition). Thus, the Petition, having been filed on January 5, 2011, was filed out of time and should not be granted as the Court is without jurisdiction.

If the Court were to conclude, Avalon believes properly, that Petitioners' motion for reconsideration

below does not equate to a "motion for rehearing" under Rule 13, then the Petition would need to have been filed on or before September 27, 2010. The New Jersey Supreme Court has stated that a denial of certification can never be considered a disposition on the merits. *Maxfield v. Board of Education of Ridgewood Township*, 217 N.J. Super. 267, 273, 525 A.2d 727, 730 (App. Div. 1986). Accordingly, Petitioners' motion for reconsideration of the New Jersey Supreme Court's denial of certification was truly not a "motion for rehearing" as contemplated by Rule 13 of the United States Supreme Court Rules.

Under either approach, the Petition was not timely filed and, respectfully, must be denied as the Court lacks jurisdiction.

II. THE ISSUES PRESENTED BY PETITIONERS WERE DETERMINED IN 2009 BY THE TRIAL COURT AND APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT TO CONSTITUTE AN EFFORT TO RE-LITIGATE ISSUES ALREADY ADJUDICATED IN BOTH THE APPELLATE DIVISION AND THE NEW JERSEY SUPREME COURT IN 2007 AND PETITIONERS SHOULD NOT BE ALLOWED TO BOOTSTRAP THESE ISSUES UP INTO THE UNITED STATES SUPREME COURT THROUGH PROCEDURAL SLEIGHT OF HAND.

As detailed herein above, the Trial Court and the Appellate Division in New Jersey characterized

Petitioners' litigation strategy after 2007 as a transparent attempt to re-litigate settled issues. The Trial Court stated, "Consistent with Plaintiffs' conduct throughout this litigation the delay of one year to seek relief is extraordinary especially when these same issues have been presented in the briefing in the Appellate Court." (A-22 to A-23 of the Petition). The Appellate Division of the New Jersey Superior Court stated that Petitioners' continuing courtroom machinations were "nothing more than an effort to re-litigate issues already adjudicated." (A-16 of the Petition). The Appellate Division, after listing the same litany of allegations which have been included in the Petition, stated, "We have already rejected these issues in the prior appeal." *Id.*

Thus, were Certiorari to be granted in the instant case, this Court would be allowing appeal of matters long ago adjudicated, the re-litigation of which was soundly rejected by the State Courts in New Jersey. Certainly, the jurisdiction of the United States Supreme Court should not be invoked on such a record. Petitioners should not be permitted to attach bootstraps to issues adjudicated in 2007 and attempt to pull them up into the United States Supreme Court through a late filed Petition for Writ of Certiorari in 2011.

III. PETITIONERS' ATTEMPT TO BRING BEFORE THIS COURT ISSUES NEVER RAISED BELOW AND MAKE ALLEGATIONS OF DUE PROCESS VIOLATIONS AGAINST THE NEW JERSEY SUPREME COURT WHERE THAT COURT IS NOT A PARTY.

As detailed above, the issues in this matter were conclusively decided in 2007. Petitions now seek to have the United States Supreme Court apply a completely inapplicable holding, which was decided in 2008, to the case at bar. This case dealt with local redevelopment and housing issues and is completely distinguishable factually and legally from the instant case. *See*, *Harrison Redevelopment Agency v. DeRose*, 398 N.J. Super. 361, 942 A.2d 59 (App. Div. 2008). This approach is, to say the least, somewhat bizarre. There is no authority for the proposition that the United States Supreme Court may be used as a mechanism to force a retrial of settled issues based on the argument that some new State case has been decided which may have persuaded the State Courts if it had existed at the time of decision. Yet, this is precisely what Petitioners attempt. Respectfully, the Court should give no credence to these arguments.

Additionally, Petitioners submit as a "Question Presented," the following:

> **Whether the New Jersey Supreme Court denied Petitioners' right to equal protection guaranteed by the Fourteenth Amendment by failing to grant equity to**

Petitioners based on *Klumpp v. Avalon* decided June 22, 2010, before denying Petitioners' appeal on June 30, 2010 and motion for reconsideration on October 7, 2010?

Here, Petitioners shift their claims from Respondents to the New Jersey Supreme Court itself. Avalon respectfully points out that the New Jersey Supreme Court is not a party to this matter and it does not appear that any claim has been filed by Petitioners against the New Jersey Supreme Court for any alleged violation of Petitioners' equal protection rights. Certainly, neither Respondent in this matter could be held responsible for the actions of the New Jersey Supreme Court in deciding one matter differently from another. That conduct would be the Court's alone. Accordingly, it is wholly improper for Petitioners to attempt to raise such claims for the first time through the use of the Certiorari procedure in the United States Supreme Court.

IV. PETITIONERS' LEGAL ARGUMENTS ARE COMPLETELY WITHOUT MERIT AND PRESENT NO QUESTION WHICH WOULD BE APPROPRIATE FOR DISPOSITION BY THE UNITED STATES SUPREME COURT.

Petitioners misstate the prior holding of this Court in *United States v. Clarke*, 445 U.S. 253, 257, 100 S. Ct. 1127 (1980). Petitioners represent that *Clarke* stands for the proposition that no governmental entity may ever effectuate a taking without

availing itself first of a statutory eminent domain process. (P16). This is not true. Chief Justice Rehnquist, writing for a 7-2 majority in the *Clarke* case expounded on the fact that there can be a claim for relief from a governmental taking of real property which occurs by other than an eminent domain proceeding, the claim being one for "inverse condemnation." *See id.* Chief Justice Rehnquist described and established a process for seeking just compensation on a claim of inverse condemnation which has been recognized in New Jersey. *See*, *287 Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320, 323 (3d Cir. 1996); *Russo Farms, Inc. v. Vineland Board of Education*, 144 N.J. 84 (1996). *See also*, *Morey v. Essex County*, 94 N.J.L. 427, 430 (E&A 1920); *Harisadan v. East Orange*, 187 N.J. Super. 65, 70 (App. Div. 1982); *Blazer Corporation v. N.J. Sports and Authority*, 195 N.J. Super. 542, 552-553 (Law Div. 1984), aff'd on other grounds, 199 N.J. Super. 107 (App. Div. 1985), certif. denied, 101 N.J. 261 (1985).

Chief Justice Rehnquist stated as follows:

> **To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation.**

United States v. Clarke, 445 U.S. 253, 257, 100 S. Ct. 1127 (1980).

It is clear that Petitioners misstate the holding of *Clarke* and their arguments in this regard should be rejected as a basis for granting Certiorari.

Petitioners next divert into a fantastical "what if" and explore what some hypothetical attorney might have concluded sometime between 1962 and 1996 about the state of the law. (P17-18) These arguments are improper and completely without merit. A hypothetical about what a Court would have decided during this period of time might be more defensible and could only reasonably conclude that the body of jurisprudence that does exist on the topic is appropriate. It is worth noting that none of these arguments were ever presented to any Court below. Clearly, these hypothetical arguments cannot form the basis for a grant of Certiorari.

CONCLUSION

Petitioners have filed out of time in violation of Rule 13 of the Rules of the United States Supreme Court. Consequently, the Court is without jurisdiction and the Petition must be denied.

The New Jersey Courts that have dealt with this litigation substantively after 2007 have all concluded that Petitioners are simply using procedural bootstrapping in order to re-litigate this case. Respectfully, the United States Supreme Court should not be used in such a manner.

Petitioners have attempted to present entirely new issues and make allegations against the New Jersey Supreme Court in order to create some basis for Certiorari that does not exist.

Petitioners' legal arguments are erroneous or based on pure speculation.

For all of the above reasons, the Petition for Certiorari in this matter should be denied.

Respectfully submitted,

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185 (3)

NO. 10-881

Supreme Court, U.S.
FILED
APR 7 - 2011
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Henry Raab and Clara Montagna,
Petitioners,

v.

The Borough of Avalon, *et al.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONERS' REPLY BRIEF IN RESPONSE TO RESPONDENT

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QUESTIONS PRESENTED BY RESPONDENT, BOROUGH OF AVALON

1. Whether Petitioners' Petition was filed late and jurisdictionally barred under Rule 13 for the Supreme Court.

2. Whether Petitioners fail to present an issue worthy of consideration by this Court.

3. Whether Petitioners bring before the Court issues not adjudicated below and or issues related to non-parties.

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REPLY TO RESPONDENT, BOROUGH OF AVALON'S STATEMENT OF THE CASE

Petitioners agree that the "facts" of the case are those found by the Courts in this matter. Where Petitioners cited documentation in the record, it was to question the findings of the Courts that ignored them.

While Avalon argues that the post judgment expungement motion to the trial judge after the New Jersey Supreme Court denial, was simply a "rehash", both the motion Judge (A-23) and Appellate Division (A-12) acknowledged that the title issue was not briefed, argued or decided by the trial Judge in his summary judgment decision, which simply denied just compensation to Petitioners based on their failure to file an inverse condemnation action by April 29, 1971 pursuant to N.J.S.A. 2A:14-1.

Avalon ignores that on July 18, 2005 it recorded (without notice to Petitioners) the trial Court's Summary Judgment order and opinion dated June 5, 2005 in the Cape May County Clerk's office where deeds are recorded and wrongfully claimed the decision affected title to Petitioners' property. Petitioners' appeal to the Appellate Division was filed on July 19, 2005. When Petitioners discovered the recordation in the Avalon Tax Assessor's office in October of 2005, Petitioners and Respondent, Avalon entered into a Tolling Agreement (A-64) allowing Petitioners to address title after all appeals were exhausted, because it was too late to reopen the

summary judgment or supplement the record for the Appellate Division.

The first New Jersey Supreme Court order of September 7, 2007 denied Petitioners' appeal and request for certification.

The motion to expunge was filed on March 24, 2008, not one year later, as asserted by the motion Judge and Avalon's attorney.

Both the trial Court Judge on motion to expunge the recordation and the Appellate Division on the second appeal confirmed that the issue of title had never been briefed, argued or decided. (A-18) (A-12).

The trial Court bifurcated title from just compensation by failing to address title in the summary judgment decision and the record for this case was not complete until the title issue was addressed and the appeals of it were exhausted on October 7, 2010.

REPLY TO RESPONDENT, BOROUGH OF AVALON'S REASONS FOR DENYING THE WRIT

I. U.S. SUPREME COURT RULES 10 AND 13 WERE OBSERVED AND FOLLOWED BY PETITIONERS AND THE FILING WAS TIMELY AND THE COURT MAY GRANT THE PETITION.

U.S. Supreme Court Rule #10 (c) provides that the Court has jurisdiction to accept a Petition for a Writ of Certiorari when "a state court . . . has decided an

important question of federal law that has not, but should be settled by this Court. . . ."

U.S. Supreme Court Rule 13, paragraph 1 provides that "A petition for writ of certiorari seeking review of a judgment of a lower court that is subject to discretionary review by the state court of last resort is timely when it is filed with the clerk within 90 days after entry of the order denying discretionary review."

U.S. Supreme Court Rule 13, paragraph 3 provides ". . . if a petition for rehearing is timely filed in the lower court . . . the time to file the petition for a writ of Certiorari for all parties . . . runs form the date of the denial of rehearing . . . ."

In *Raab v. Borough of Avalon* on motion by Petitioners to the trial Judge requesting expungment of the June 6, 2005 recordation of the original Summary Judgment Order and opinion (A-18), without notice to Petitioners, in the Cape May County Clerk's office with deeds pursuant to N.J.S.A 46:16-1.1 (A-198), which requires that the order and/or decision affect title as a condition of recordation. The motion Judge acknowledged that the ". . . title question was never argued, briefed or decided in the prior proceedings, it is the clear implication of that decision that title vested in the Borough of Avalon in April 1971 upon the failure of Petitioners to seek just compensation." (A-23) The motion Judge acknowledged that ". . . Most likely the Borough should have brought an action for a Declaratory Judgment to clear title." (A-23) The

motion Judge went on to rule ". . . that Avalon now owns the property and has title by way of the taking and that Petitioners' ownership interests are extinguished..." (A-23) Thereafter, the motion Judge entered Declaratory Judgment in favor of Avalon validating the recordation of the initial Summary Judgment order and opinion and confirming title vested automatically in Avalon. (A-26) While the Judge found the vesting of title occurred in 1971 when the six year statute of limitation (N.J.S.A. 2A:14-1) lapsed, he confirmed the 2005 recordation by Avalon, which claimed title as of 1962. (A-18)

In *Raab v. Avalon,* 2009 WL 2224033 (N.J. Super. A.D.), the Appellate Division held that ". . . legal title vested in the Borough as a result of the inverse condemnation that occurred." (A-16).

The Appellate Division also held that "While it is true that the title question was never argued, briefed or decided in the prior proceedings, it is the clear implication of that decision that title vested in the Borough of Avalon in April of 1971 upon the failure of Petitioners to seek just compensation." (A-12)

Both the motion Judge on April 25, 2008 and the Appellate Division ruling on the appeal from the motion Judge's decision acknowledge the title was not addressed in the Summary Judgment decision on June 5, 2005 nor the first Appellate Division decision, 392 N.J. Super. 499 (A.D. 2007).

Accordingly, the second Appellate Division decision was appealed to the New Jersey Supreme Court and

denied on June 30, 2010 (A-1) and Petitioners sought reconsideration in light of *Klumpp v. Avalon,* 202 N.J. 390, 997 A.2d 967 (2010), which was denied on October 7, 2010.

The New Jersey Supreme Court is the court of last resort in New Jersey and it denied the Petitioners' Appeal and Petition for Certification on June 30, 2010 and Petitioners Motion for Reconsideration on October 7, 2010. Based on the last denial on October 7, 2010, the 90th day after was January 5, 2011, the date on which the Petition for Writ of Certiorari to this Court was filed.

Accordingly, the Petition was timely filed with the Clerk of this Court.

II. PETITIONERS' TITLE WAS DECIDED BY THE TRIAL COURT MOTION JUDGE ON APRIL 25, 2008 AND THE APPELLATE DIVISION ON JULY 28, 2009.

Respondent, Avalon misstated the title issue decision dates which were April 25, 2008 on the trial Court Motion to Expunge and July 28, 2009 when the Appellate Division denied the second appeal.

Both courts acknowledged that title to Petitioners' property was not addressed until the trial Court decided the motion to expunge. (A-23) and the Appellate Division decided the appeal from that decision. (A-17) Therefore, the record was not complete until October 7, 2010 when the New Jersey

Supreme Court denied reconsideration of its denial of the 2nd appeal.

III. DUE PROCESS AND EQUAL PROTECTION UNDER THE 5TH AMENDMENT OF THE U.S. CONSTITUTION WAS RAISED BY PETITIONERS.

A. DUE PROCESS: The Petitioners complaint, counts I, II and II, allege violation of the 5th Amendment of the U.S. Constitution and Count V specifically alleges a deprivation of property without due process, just compensation and equal protection in violation of the 14th Amendment of the U.S. Constitution and 42 USC§ 1983.

The first trial Judge's decision on Summary Judgment, the first Appellate Division decision, the second trial Court decision on motion to expunge the recordation of the first trial Court decision and order and the second Appellate Division decision all conclude that Avalon took Petitioners' property without due process, but then concludes that Petitioners are without remedy since they failed to sue by April 1971. How can the courts sanction the automatic vesting of title without notice or due process, when the condemnor acted without observing due process?

Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361, 942 A.2d 59 (App. Div. 2008) was decided February 25, 2008. The Motion to Expunge was filed on March 24, 2008 and decided April 25, 2008. Petitioners' attorney discovered the opinion in *Harrison, id* sometime after the trial Court decision

on the Motion to Expunge and after filing the appeal to the Appellate Division.

However, the case was included and argued in Petitioners brief filed on September 29, 2008 with the Appellate Division, Petitioners brief dated August 17, 2009 on the appeal and petition for certification before the New Jersey Supreme Court and brief on the motion for reconsideration.

B. Equal Protection: *Klumpp v. Avalon*, 202 N.J. 390, 997 A.2d 967 (2010), a companion case to this matter, was decided on June 22, 2010. Petitioners' second appeal and petition for certification to the New Jersey Supreme Court was filed on August 17, 2009 and denied on June 30, 2010.

Therefore, upon learning of the *Klumpp, id* decision of June 22, 2010 and the denial by the New Jersey Supreme Court on June 30, 2010, Petitioners filed a Motion for Reconsideration and brief on July 12, 2010, arguing both due process and the applicability of *Klumpp, id.*

IV. PETITIONERS PRESENT AN IMPORTANT ISSUE TO THE COURT NEVER DECIDED BY NEW JERSEY COURTS OR THE U.S. SUPREME COURT BEFORE THIS CASE.

A. Neither the New Jersey Courts nor the U.S. Supreme Court has decided how or when a condemnor acquires title if a condemnee fails to sue for just compensation within the time permitted by a statute of limitation.

The motion Judge in his opinion dated April 25, 2008 acknowledged that he did not address title (A-23) and then he proceeded to indicate that title to Petitioners property automatically vested in Avalon when the 6 year statute of limitation lapsed in 1971. (A-23) The second Appellate Division decision 2009 WL 2224033 (N.J. Super. A.D.), confirmed that title had not been addressed by the trial Judge in the June 5, 2005 decision, but agreed with the motion Judge that while title had not been addressed, title vested in Avalon in April of 1971 upon failure of Petitioners to file an inverse condemnation action to seek just compensation. (A-12)

The New Jersey Supreme Court denied Petitioners' appeal and Petition for Certification on June 30, 2010 after deciding *Klumpp v. Avalon,* 202 N.J. 390 997 A.2d 967 (2010) which is based on the same essential facts as in *Raab*. Petitioners filed a motion for reconsideration based on the *Klumpp* case, which was denied on October 7, 2010.

Petitioners could not rely on the *Klumpp* case, until it was decided on June 22, 2010. The motion for reconsideration made that decision an issue.

B. Nowhere in *U.S. v. Clarke,* 445 U.S. 253, 100 S.Ct. 1127 (1980) does the Court hold or suggest that, if a statute of limitation time bars an action for inverse condemnation, that title to the subject property "automatically vests" in the would be condemnor. Neither, seizure nor possession equate to legal title in the world of conveyancing real property.

If the case does stand for automatic vesting of title in the condemnor once an action for just compensation is time barred, then it should be reexamined in light of our land title recording system that relies on recorded documents to confirm ownership of real property. Here automatic vesting of title in Avalon as of 1962 or 1971 does not appear until the July 18, 2005 recordation of the Summary Judgment and Order, leaving a gap of 43 or 34 years before recordation.

CONCLUSION

In conclusion, Petitioners point out that Avalon Resolution 62-102 (A-183) adopted on April 15, 1962 in the aftermath of the March 1962 northeast storm that devastated the Avalon coastline authorized Avalon to take emergency control and possession of all property from 13th to 80th Streets in Avalon and further stated that no just compensation would be paid, if it was a valid police power action and if it was a taking of property, just compensation would not be denied, (paragraph 4, A-183 and A-184) leaving the question, "which was it?", never answered by Avalon, until Petitioners filed a Complaint and alleged title to the lots in question and Avalon filed an amended Answer (A-70) on January 3, 2005, which denied Petitioners' claim of title and asserted forfeiture.

Avalon continued taxing the property and accepting payment from the owners without objection and didn't object to any of the two recorded deeds filed by

Tri-Guy Holding Co. Inc. to its shareholders and then from two shareholders and the estate of the third shareholder to Petitioners. In 1983 Avalon responded to Petitioners' attorney that that Avalon was not interested in purchasing Petitioners property, but did not say Avalon owned it. (A-179) In a 2002, State Aid Agreement both the Department of Environmental Protection for beach and sand replenishment and Avalon agreed that it was required to acquire the lots in question making clear Avalon did not believe it owned Petitioners' property.

Had Petitioners checked the law in 1965, they would have found N.J.S.A. 2A:14-1, which did not time bar just compensation, denial of due process, a taking of real property or inverse condemnation.

The often cited case *Morey v. Essex County*, 94 N.J. 427, 10 A. 905 (E and A 1920) involved a continuing trespass plainly covered by N.J.S.A. 2A:14-1 and entitled the property owner to damages for trespass during the previous six years. Why would Petitioners consider that decision to bar just compensation?

In *Harisadan v. City of East Orange,* 187 N.J. Super. 65, 453 A.2d 888 (A.D. 1982) the court did deal with an inverse condemnation regarding a "blighted area" designation, which the court found was continuing, but premature until the designation of blight was lifted or other related activities occurred along with the passage of time.

In the matter of *Russo Farms v. Vineland Board of Education,* 144 N.J. 84, 675 A.2d 1077 (1996), the

New Jersey Supreme Court held that diverting flood water on someone's property was a continuing nuisance and restricted damages to six years prior to the Complaint.

In *287 Corporate Center Assoc. v. Township of Bridgewater,* 101 F.3d 320 (3d Cir. 1996), the court found that when Congress failed to establish a statute of limitation for a federal cause of action, it should look to the most analogous State statute of limitation which it found to be N.J.S.A. 2A:14-1 to time limit an inverse condemnation.

No decision by any Court in New Jersey nor by this Court has ever decided whether title automatically vests in the would be condemnor upon a failure of a would be condemnee to sue for just compensation within the time limit of the statute of limitation such as N.J.S.A. 2A:14-1. (A-190)

Had Petitioners researched the case law of New Jersey regarding statutes of limitations in 1962, 1965 and 1971, they would have found the plain language of N.J.S.A. 2A:14-1 that did not mention inverse condemnation, just compensation, denial of due process or taking of real property until judicially amended by the addition of "inverse condemnation" but not just compensation, due process or taking of real property in 1982 or for sure in 1996. Petitioners suggest Avalon's construction of a dune on their property was a continuing trespass like the road built by Essex County in *Morey Id.* or the flooding called a continuing nuisance as in *Russo Farms Id.*

Avalon first admitted they took Petitioners' property and claimed Petitioners forfeited the property to Avalon when they filed the first amended answer in January 2005. Avalon told the world of the taking of title by automatic vesting when they recorded the June 5, 2005 order and opinion of the trial Judge.

Avalon denied Petitioners due process by failing to condemn the property under the New Jersey Eminent Domain Act, the statutory process to acquire property that guarantees due process (N.J.S.A. 20:3-5 & 6, A-191 and A-192) Avalon concealed the taking by their conduct. Should Avalon be rewarded for ignoring due process?

THE *DeROSE* SOLUTION

In the matter of *Harrison Redevelopment Agency v. DeRose,* 398 N.J. Super. 361, 942 A.2d 59 (A.D. 2008) the New Jersey Appellate Division saved the N.J. Local Redevelopment and Housing Law from a due process flaw by requiring a notice from the municipal entity designating a redevelopment area served on the affected property owner, identifying the land designated for redevelopment and indicating the time limit for the owner to take legal action. When it was too late for the notice to be served, the owner's right to contest the action was preserved.

In order for the Court to rule that Petitioners' self notice was sufficient, the record should confirm that they knew their land was seized and *they had six years to file suit*, something they could not have

known until 1982 or 1996. The record does not reveal any proof that Petitioners' predecessors knew or could have known, in 1962, 1965 or 1971 that they had six years to file suit or title would automatically vest in Avalon.

Shouldn't notice be required in order to avoid such situations, preserve due process and protect our land title recording system? N.J.S.A. 20:3-5 and 6 (A-191 and A-192) mandates such notice and due process and the *DeRose* solution would preserve Petitioners' 5th and 4th Amendment rights, until Avalon condemns the property as mandated by the N.J. Eminent Domain Act.

Petitioners urge the Court to grant a Writ of Certiorari in order to resolve these issues for Petitioners and all others.

Respectfully Submitted,

_____ Dated: April 7, 2011

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